10/8/81

STATE OF WISCONSIN PERSONNEL COMMISSION

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ROGER E. ALFF,

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case Nos. 78-~~277~~ 237-PC, 78-243-PC

* * * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

These are consolidated appeals purusant to s.230.44(1)(c), Stats., of a suspension and discharge. Prior to the commencement of the hearing there were a number of disputes between the parties regarding the adequacy of the appeal documents, prehearing discovery, and other procedural matters. The Commission issued five written Interim Decisions on these matters prior to hearing. The hearing examiner issued one written Interim Decision prior to hearing and three written Interim decisions during the course of the hearing. Following thirteen days of hearing on the merits, a transcript was prepared, and the parties filed post-hearing briefs.

FINDINGS OF FACT

1. The appellant began employment with the State of Wisconsin in 1949 and at all relevant times has had permanent status in the classified civil service.

2. The appellant was director of the Bureau of Municipal Audit (BMA) in Department of Revenue (DOR) from his appointment in March, 1970, until his discharge effective November 11, 1978. This position has had the civil service classification of Director, State Bureau of Municpal Audit, and as of November, 1978, was in pay range 1-20.

3. The appellant has been a licensed Certified Public Accountant (CPA) in Wisconsin since 1970.

4. During the aforesaid period, one of the BMA's responsibilities included, pursuant to s.73.10(5), Stats., the conduct of audits of local units of government at their request and for a fee. The BMA received fees of $1,779,016 during the period July 1, 1977, to June 30, 1978, and $2,999,473, during the period July 1, 1978, to June 30, 1979.

5. The BMA also had the responsibility for conducting audits of certain nursing home cost reports filed under the Medicaid program, pursuant to a contract between BMA and the state Department of Health and Social Services (DHSS), entered into in December, 1977.

6. The American Institute of Certified Public Accountants (AICPA) is a professional body that sets the basic standards of accountancy for the accounting profession in the Unites States.

7. The AICPA, through its Auditing Standards Board, has issued a book entitled Codification of Statements on Auditing Standards, Respondent's Exhibit 1.

8. Respondent's Exhibit 1 contains what are generally known in the accounting profession as Generally Accepted Auditing Standards (GAAS).

9. Respondent's Exhibit 1 and GAAS are accepted by the accounting profession generally as providing the basic framework for the conduct of financial audits of all entities, including municipal units of government.

10. Although Respondent's Exhibit 1 is the most up-to-date compilation of GAAS, having been published in 1979, this edition has been preceded by others which have been in effect at all times here material, including the period of appellant's tenure as BMA director.

11. In 1968, the National Committee on Governmental Accounting of Municipal Finance Officers Association, a professional organization, issued a publication entitled Governmental Accounting, Auditing and Financial Reporting, which states, in part as follows:

> "The American Institute of Certified Public Accountants, through its Committee on Auditing Procedure, has developed and promulgated generally accepted auditing standards which should be observed and complied with in all governmental post-audits." Respondent's Exhibit 3.

12. In 1972, the United States Comptroller General, General Accounting Office (GAO) issued a publication entitled Standards for Audit of Governmental Organizations, Programs, Activities and Functions, which contained in part the following:

> "This statement contains a body of audit standards that are intended for application to audits of all government organizations, programs, activities, and functions--whether they are performed by auditors employed by Federal, State, or local governments; independent public accountants; or others qualified to perform parts of the audit work contemplated under these standards. These standards are also intended to apply to both internal audits and sudits of contractors, grantees, and other external organizations performed by or for a governmental entity. These audit standards relate to the scope and quality of audit effort and to the characteristics of a professional and meaningful audit report.
>
> The American Institute of Certified Public Accountants (AICPA) has adopted standards and procedures that are applicable to audits performed to express opinions on the fairness with which financial statements present the financial position and results of operations.[1] These standards are generally accepted for such audits and have been incorporated into this statement. However, the interests of many users of reports on government audits are broader than those that can be satisfied by audits performed to establish the credibility of financial reports. To provide for audits that will fulfill these broader interests, the standards in this statement include the essence of those prescribed by the American Institute of Certified Public Accountants and additional standards for audits of a broader scope as will be explained subsequently.

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[1]The basic standards are included in "Statements on Auditing Standards," issued by the American Institute of Certified Public Accountants.

13. In 1974, the AICPA Committee on Governmental Accounting and Auditing issued a publication entitled Audits of State and Local Governmental Units, which included in part the following:

> "Despite certain differences underlying the reasons for governmental and commercial audits, generally accepted auditing standards are applicable in both situations. These are delineated in the ten standards No.1, 'Codification of Auditing Standards and Procedures.'" Respondent's Exhibit 5.

14. The State of Wisconsin Accounting Examining Board had promulgated an administrative rule, s. Accy 1.202, Wis. Adm. Code, effective July 1, 1974, which provides as follows:

> "(1) No person licensed to practice as a certified public accountant, or public accountant, as defined in the statutes, shall permit his name to be associated with financial statements in such a manner as to imply that he is acting as an independent public accountant, unless he has complied with the applicable generally accepted auditing standards as promulgated by the American institute of certified public accountants. Statements on auditing standards issued by the American institutes of certified public accountant's committee on suditing standards are, for purposes of this rule, considered to be interpretations of the generally accepted auditing standards, and departure from such statements must be justified by those who do not follow them."

15. The U.S. "Revenue Sharing Act," see 31 U.S.C. 1221, et. seq., includes in part the following, s.123(c)(1):

> "Each state government and unit of local government which expects to receive funds under subtitle A for any entitlement period beginning on or after January 1, 1977...shall have an independent audit of its financial statements conducted for the purpose of determining compliance with this title, in accordance with generally accepted auditing standards, not less often than every 3 years." (Emphasis supplied)

16. The contract which DOR entered into with DHSS, on December 20, 1977, to audit nursing home cost reports provided that audits would be made "in accordance with applicable audit standards set forth in Health Insurance Manual (HIM-18), issued by the Social Security Administration, or standards established

by DHSS." Respondent's Exhibit 20/I., and the parties later agreed to utilize the HIM-16 standards.

17. HIM-16 provides in part: "The auditor's examinations will be made in accordance with the 'Standards for Audit of Governmental Organizations, Programs, Activities and Functions,' published (1972) by the Comptroller General of the United States applicable to examinations of financial operations." Respondent's Exhibit 20/III.

18. Sec. PI 14.03, Wis. Adm. Code requires that school district audits "shall be in accordance with generally accepted auditing standards." This requirement became applicable on July 1, 1977, initially as an emergency rule and subsequently as a permanent rule.

19. The BMA, at all times here relevant, was required to comply with GAAS as set forth in Respondent's Exhibit 1 or its predecessor editions.

20. The accounting firm of Murray Dropkin and Company made an extensive study of the BMA in March - May, 1978, and issued a preliminary report dated June 6, 1978, Respondent's Exhibit 8, and a final report dated July 12, 1978, Respondent's Exhibit 9, copies of both of which were received by the appellant.

21. These reports cited certain BMA problem areas including failure to adhere to GAAS in general, and absence of engagement letters and representation letters, audit programs, internal control questionaires, inadequate documentation of work completed in the working papers and problems with respect to central office review of field work.

22. At least since July, 1977, and prior to the development of an internal control questionaire for nursing home audits in the summer of 1978, the appellant did not establish any written policies and procedures for the evaluation of the internal controls of BMA clients.

23. The aforesaid failure to establish such written policies and procedures contributed substantially to the failure of the BMA to properly evaluate internal controls in violation of GAAS, see AU s. 320.01, Respondent's Exhibit 1, and had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

24. At least since 1977, and until discharged, the appellant did not establish policies and procedures for obtaining client representations, which are required to help protect against the failure of clients to fully disclose all information which is necessary to complement auditing procedures.

25. The aforesaid failure to establish such written policies and procedures contributed substantially to the failure of the BMA to obtain client representations when appropriate in violation of GAAS, see s. AU 333, Respondent's Exhibit 1, and had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

26. On March 31, 1978, the appellant issued an audit report for the City of Milwaukee with an unqualified opinion prior to a complete review of the work papers by the field staff or central office audit review staff.

27. The issuance of the City of Milwaukee audit report as aforesaid was in violation of the third General Standard, GAAS, that "Due professional care is to be exercised in the performance of the examination and the preparation of the report," Respondent's Exhibit 1, AU s. 150.02, and had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

28. On June 7, 1978, the appellant's supervisor, Sylvan Leabman, sent the appellant a memorandum which stated as follows:

> "Per our conversation yesterday, you will submit a plan to me within two weeks which will assure that all work and review of documents is completed before the 1979 opinion is issued for the City of Milwaukee. As you know Statements on Auditing Standards Section 530.01 "Dating of the Independent Auditors Report," from the AICPA sets forth the procedure for dating of reports. No other procedure is acceptable to the Department, nor chould any other system be used by the Bureau of Municipal Audit.
>
> In addition, I want the 1978 Milwaukee completed as soon as physically possible. You should get me a scheduled completion date by June 9, 1978 p.m." Respondent's Exhibit 37.

29. The appellant's response to the first sentence of the aforesaid memo lacked any plan for the assignment of personnel and the scheduling of work, for adequate instructions to personnel relative to the plan and for inspection to ensure that the plan was completed, and this had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

30. At least since June 1977, and up to June 7, 1978, when Mr. Leabman ordered him to discontinue the practice, the appellant caused all BMA audit reports to be dated the date typing of the report commenced rather than the date the fieldwork was completed, in violation of GAAS, Respondent's Exhibit 1, AU s. 530.01, and therby exposing the state to additional and unnecessary liability from the date of the completion of field work to the date of signing the reports.

31. The appellant's practice as aforesaid had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

32. At least since December, 1977, when the nursing home cost report contract with DHSS was signed, and until discharged, the appellant did not fail to establish policies and procedures to ensure that the BMA auditors independently verified the carrying values of fixed assets during the course of the nursing home

cost report audits as required under the federal audit program, HIM-16.

33. The appellant's handling of this matter as aforesaid did not have a tendency to impair the appellant's performance of duties of his position and the efficiency of the BMA.

34. At least since June, 1977, and to the time of discharge, the appellant had not established policies and procedures to ensure proper documentation in the working papers to show what documents were examined and what auditing tests were used in the performance of the audit, in violation of GAAS, see Respondent's Exhibit AU s. 338.

35. The appellant's failure to establish policies and procedures as aforesaid had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

36. On June 19, 1978, the appellant issued the Brickson Nursing Home audit report as an unqualified opinion, notwithstanding the fact that the working papers and the auditor's notes show that verification of all expenditures was not made due to inadequate and non-existent documentation, but this was not in violation of GAAS, Respondent's Exhibit 1, AU s. 509.10, as alleged by respondent, inasmuch as most of the undocumented expenditures had to do with cash purchases of food which was necessary for the operation of the home, and the judgment to issue an unqualified opinion was within the range of proper professional discretion.

37. The appellant's issuance of the Brickson Nursing Home audit report as aforesaid did not have a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

38. On June 2, 1978, the appellant issued the Maple Lane Health Care Center audit report as an unqualified opinion, notwithstanding the facts that a daily census of patients was not taken and no review was made of payroll checks, but this was not in violation of GAAS, Respondent's Exhibit 1, AU s. 509.10, as alleged by respondent, inasmuch as there existed other adequate evidential matter, and the judgment to issue an unqualified opinion was within the realm of proper professional discretion.

39. The appellant's issuance of the Maple Lane Health Care Center audit report as aforesaid did not have a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

40. On June 8, 1978, the appellant issued the Wisconsin Lutheran Child and Family Service, Inc., audit report as an unqualified opinion, notwithstanding the fact that the payroll and revenue sections of the internal control questionaire were not complete, but the appellant's action in this respect was not in violation of GAAS, respondent's Exhibit 1, AU s. 509.10 in this respect, as charged by respondent, inasmuch as the completion of the work reflected by the incomplete sections of the internal control questionaire was reflected in other working papers of the auditor, and there were no restrictions on the scope of the examination such as to have required a qualification or disclaimer of opinion.

41. The appellant's issuance of the Wisconsin Lutheran Child and Family Service, Inc., audit report as aforesaid did not have a tendency to impair the appellant's performance of the duties of his position or the efficiency of the BMA.

42. On September 29, 1978, the appellant submitted a report to the regional office of the Office of Revenue Sharing, U.S. Department of the

Treasury, which described the BMA's federal revenue sharing audit activity for the quarter ending September 30, 1978. See Respondent's Exhibit 58. He indicated in this report that GAAS was used in 12 federal revenue sharing audits during the quarter ending September 30, 1978. The appellant knew or should have known that such standards were not employed by the BMA as indicated, more specifically, that internal controls were not being adequately evaluated, that required client representation letters were not being obtained, and that adequate working papers were not being maintained with respect to containing required references, all as required by GAAS.

43. The submission of the aforesaid report by the appellant had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

44. On June 7, 1978, the appellant was directed by his immediate supervisor, Sylvan Leabman, Administrator, Division of State/Local Finance, to immediately implement appropriate standards for the issuance of audit reports, specifically AU s. 530.01, Respondent's Exhibit 1, regarding dating of the independent auditor's report. On July 27, 1978, the appellant issued an audit report for the City of Milwaukee, dated July 27, 1978, which was in violation of the aforesaid directive and AU s. 530.01, inasmuch as it was not dated, the date of completion of field work (June 9, 1978) and no "subsequent event" occurred after the completion of field work which would have made an alternative method of dating appropriate.

45. The appellant's issuance of the City of Milwaukee audit report as aforesaid had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

46. On May 25, 1978, the appellant issued the nursing home cost report audit for Jefferson Meadows Care Center. This audit report contained an error of about $55,000 in that it allowed, as an item of cost, rent in this amount paid for a facility used by Jefferson Meadows and owned by a related party. A proper supervisory review of the report as required by GAAS, Respondent's Exhibit 1, AU s. 150.02, which probably would have found and corrected the error, was not made.

47. The appellant's issuance of the Jefferson Meadows Care Center report as aforesaid, without having ensured a proper supervisory review, had a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA.

48. All of the auditor's reports issued by the BMA during the period here in question (at least since June, 1977) were signed with the appellant's name followed by the initials "C.P.A."

49. On June 9, 1978, Mr. Leabman signed a discretionary performance award report on the appellant, Respondent's Exhibit 41, with a performance categorization of "Needs Improvement." The comments included the following remarks:

> "It is critical that a more rigorous training program be pursued and developed for staff so that they keep informed of state and national changes in governmental accounting and auditing . . .For a number of years audit reports have been improperly dated, leaving the Bureau and State subject to legal exposure and possible (even if highly improbable) lawsuit . . .there has been less than adequate review of worksheets before audit reports have been completed. Although the Bureau had only limited central office staff to complete such reviews, audit reports should never have been issued and opinions given without careful review. The fact that this has occurred under Roger's leadership makes him bear the responsibility as Director."

This evaluation was the first evaluation of appellant during his tenure as BMA director which was less than average or "in the manner required."

50. On October 6, 1978, Mr. Leabman suspended the appellant for three days without pay, effective October 10-12, 1978, see Commission's Exhibit 1B, on the basis of charges of inadequate performance relative to the improper dating of the July 27, 1978, City of Milwaukee audit report, and a $55,000 error in the May 25, 1978, Jefferson Meadows Care Center audit report.

51. Following this suspension, the appellant filed on October 19, 1978, a noncontractual grievance contesting the suspension. See Respondent's Exhibit 57. The grievance contained in part the following with regard to the charge of improperly dating the City of Milwaukee audit report.

> "It should be noted that the procedure in question is not mandated by Section 530.01 (Codification of Statements on Auditing Standards, Respondent's Exhibit 1). The Administrators interpretation of that Section is accordingly inappropriate for the second time . . .Our bureau has not incurred any liability or reaction for post or predating audit reports during more than 65 years of operation."

52, On October 30 or 31, 1978, Mr. Leabman discussed with the appellant the report to the Office of Revenue Sharing, Respondent's Exhibit 58, which state that the BMA conducted its revenue sharing audits in accordance with GAAS. Mr. Leabman stated that he was upset about the report because the BMA was not in compliance with GAAS and the appellant knew it. Mr. Alff replied that it was a "technicality." Mr. Leabman than asked whether BMA used representation letters, engagement letters and other things required by GAAS and appellant replied that he saw his point.

53. On November 6, 1978, Mr. Leabman discharged the appellant effective November 12, 1978, for inadequate performance on the basis of 11 charges, see Commission's Exhibit 1.

54. Prior to determining to discharge the appellant, Mr. Leabman considered the alternative of demotion, but was unable to identify a suitable position for demotion and in addition felt that the problems with appellant's performance were so substantial that discharge was mandated.

CONCLUSIONS OF LAW

1. These cases are properly before the Commission pursuant to s.230.44(1)(c), Stats.

2. The respondent has the burden of proving that the discipline was for just cause, and not excessive.

3. The burden of proof is that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence.

4. The respondent has sustained his burden of proving that the suspension and discharge were for just cause, and not excessive.

OPINION

The framework for the decision of disciplinary appeals is as set forth in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), which reiterated the definition of the test for determining whether "just cause" exists for termination as follows:

> "' . . .one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works."

The Safransky test requires a two-part analysis. The first question is whether the basic facts are proven - for example, that on a particular date the employe issued an audit report dated the date it was typed as opposed to the date of the completion of field work. The second question is whether the

facts as found can reasonably be said to have a tendency to impair the employe's performance of the duties of his or her position or the efficiency of the employe's work unit.[1]

The charges against the appellant are in essence that he failed to provide the requisite direction and supervision to the Bureau of Municipal Audit to ensure that it performed its audit function in accordance with appropriate professional standards. The respondent's position is that these standards are what have been described as generally accepted auditing standards, (GAAS), as set forth in the publication "Codification of Statements on Auditing Standards," Respondent's Exhibit 1, which in turn have been incorporated by, or added to in, the specific requirements of particular programs, such as the nursing home cost reports. The appellant argued that "GAAS HAS NO APPLICABILITY WHATSOEVER TO THE BMA. THERE IS NO REFERENCE, DIRECT OR INDIRECT, TO IT IN ANY OFFICIAL, AUTHORITATIVE STATE DOCUMENT." Appellant's brief, p. 10.

In the opinion of the Commission, the evidence was overwhelming that GAAS applied to the work of the BMA during the period covered by the charges. Included among the witnesses were CPA's from three accounting firms, including one who also was chairperson of the Auditing Standards Board of the American Institute of Certified Public Accounting and one who was assistant professor of Accounting and Information Systems at the UW Business School. They all testified that in their opinions GAAS

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[1] A third question, resulting from a change in the civil service law effected by chapter 196, Laws of 1977, which gives the Commission the authority to modify as well as affirm or reject appealed actions, see s.230.44(4)(c), Wis. Stats.; Hess v. DNR, Wis. Pers. Commn. 79-203-PC (8/19/80), is whether the discipline imposed is excessive. This is discussed below.

applied both to the nursing home audits and to all audits.

Even in the absence of the expert opinions on this subject, there is a great deal of evidence supporting the proposition that GAAS applied to the BMA during the period in question as set forth in the charges. Section Accy 1.202, Wis. Adm. Code, which was effective July 1, 1974, provides that a CPA shall not "permit his name to be associated with financial statements in such a manner as to imply that he is acting as an independent public accountant , unless he has complied with the applicable generally accepted auditing standards..." By signing BMA reports with the initials "C.P.A." after his name, the appellant indicated that these reports were prepared in accordance with GAAS, and obligated himself to ensure that they were.

Furthermore, the legal system has looked to GAAS for minimum standards of due professional care in litigation involving the liability of auditors. See Rhode Island Hospital Trust National Bank v. Swarty. Bresenoff, Yowner and Jacobs, 455 F. 2d 847, 852 (U.S. Ct. of Appeals 4th Cir. 1972):

> "Our conclusions with respect to the report and disclosure are reinforced by reference to industry standards of what should have been done in these circumstances. While industry standards may not always be the maximum test of liability, certainly they should be deemed the minimum standard by which liability should be determined. Brief references to American Institute of Certified Public Accountants, Statements on Auditing Procedure No. 33 (1963) are sufficient to prove the point." (emphasis added).

See also, Hochfelder v. Ernst & Ernst, 503 F. 2d 1100, 1108 (7th Cir. 1974) (reversed other grounds, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed 2d 688 (1976)):

> "The extent or scope of Ernst & Ernst's statutory dute of inquiry imposed by section 17(a) (Securities Exchange Act of 1934, 15 U.S.C. s.78g(a)) and Rule 17a-5 is clearly set forth in Form X-17A-5:

> 'The audit shall be made in accordance with generally accepted auditing standards...'
>
> The duty to audit in accordance with generally accepted auditing standards does not differ from the duty which is otherwise imposed by law . . . or the accounting profession itself."

Finally, see also Securities and Exchange Commission v. Arthur Young & Co., 590 F. 2d 785, 787-788 (9th Cir. 1979) which involved a civil action alleging violations of the securities laws in connnection with certain of Arthur Young & Co.'s audits:

> ". . .in a statutory enforcement proceeding such as this, negligence, rather than scienter, constitutes the standard by which an accountant's or auditor's performance must be measured...
>
> * * *
>
> On the facts of this case, Arthur Young discharged its professional obligations by complying with GAAS in good faith."

Beyond these general requirements there were specific requirements. The BMA contract with DHSS for nursing home cost report audits provided that the audits be done in accordance with federal requirements that incorportated GAAS. The federal revenue sharing act required that audits be in accordance with GAAS. Section PI 14.03, Wis. Adm. Code, required that school district audits be in compliance with GAAS. In addition, reports were issued which contained opinions which were stated to be in accordance with GAAS. See City of Milwaukee Audit Report dated March 31, 1978, Respondent's Exhibit 10, and City of Milwaukee report dated April 5, 1978. Respondent's Exhibit 11, Appendix A, p. 1.

The appellant argues in his brief that s. 73.10(5), Stats., which authorize the BMA to conduct audits of local units of government, makes no reference to GAAS. However, the Commission attaches no significance to the

fact that the legislature did not include in this subsection a specific enumeration of the professional standards to be utilized in the conduct of the auditing work. It certainly does not follow that the legislature did not intend that such work be conducted in accordance with appropriate professional standards.

The appellant also argues that there is no reference to GAAS in the class specifications for Director, Bureau of Municipal Audit, Appellant's Exhibit T, his position description, Appellant's Exhibit KK, or the exam announcement when he competed for the position, appellant's Exhibit H. These documents describe in a general way the duties and responsibilities of the position. They are not intended to set forth the details of how the work is to be performed. Their failure to specify the particular professional standards which are applicable to the manner in which those duties, and responsibilities are to be performed is of no significance.

The appellant also cites a policy statement issued by the AICPA Board of Directors and published in the Journal of Accounting in May, 1978, are Appellant's Exhibit HH. The appellant in his brief quotes the following from the policy statement:

> "The ethical rule and the auditing standards as well as official interpretations of them by AICPA bodies contemplate that the auditor will be a Certified Public Accountant engaged in the public practice of accountancy. However, audits of financial statements are also made by Federal, state, and local government auditors and laws or regulations may require that the opinion of a governmental auditor on financial statements be expressed in essentially the same form as the report of an independent Certified Public Accountant...Since the AICPA's ethical rules and auditing standards contemplate that an independent auditor is one engaged in the public practice of accountancy, the AICPA has not provided guidance specifically applicable to governmental auditors conducting financial audits." (Appellant's Exhibit HH)

The appellant argues that this indicates that GAAS does not apply to work done by the BMA. However, the statement does not say that GAAS is not applicable to government auditors, but rather that the ethical standards and GAAS "contemplate" that an independent auditor is one engaged in the public practice of accountancy. To "contemplate" is to "expect," see Webster's World Dictionary, Second College Edition (1972), p. 306. In essence, what the statement says is that the standards were developed with the independent auditor in mind, not that they exclude the governmental auditor. It bears emphasizing that the subject of this statement - the independence of governmental auditors and finance audits - concerns one facet of auditing where there is a distinct difference between governmental and non-governmental auditors. This is because "governmental auditors are employes of governmental units" whereas independent auditors are not employes of the audited entity. The statement points out that the auditing standards do not address the potential inherent problems of independence of the governmental auditor, and states that if a governmental auditor meets the guidelines or independence developed by the GAO, it would be appropriate for the auditor to state that the examination was made in accordance with GAAS.[2] This statement cannot be construed as a pronouncement that GAAS is inapplicable to governmental auditors.

In the final analysis, the debate as to whether BMA was required for the basis of - - general principles to have conducted its audits in accordance with GAAS, is almost beside the point. The appellant as the BMA Director

[2]Under the GAO standards, state auditors are considered independent when auditing local governments. BMA independence is not an issue in this case.

signed BMA reports as "C.P.A." The federal Revenue Sharing Act required that local governments be audited in accordance with GAAS. School district audits had to be done in accordance with GAAS, pursuant to the Wisconsin Administrative Code. The contract between DHSS and BMA for the conduct of nursing home cost report audits incorporated federal standards which required compliance with GAAS. These factors imposed independent requirements that BMA have performed its audits in accordance with GAAS.

CHARGE 1 - SUSPENSION

The first reason given for the suspension, in summary was that the appellant on July 27, 1978, issued the City of Milwaukee audit report under an incorrect date - i.e., it bore the date it was typed rather than the date of completion of field work. It was alleged that this occurred after the appellant had been instructed specifically by Mr. Leabman, on June 7, 1978, that audit reports should be dated pursuant to GAAS requirements.

The basic facts are not in dispute.

The appellant argues that the language of GAAS as to dating audit reports is not mandatory, since it states that "Generally, the date of completion of filed work should be used as the date of the independent auditor's report." (emphasis added) AU s. 30.01, Respondent's Exhibit 1. However, the only permissible deviation from this procedure is when there certain specific "subsequent events" occur after the completion of field work. See Au s. 530.05, Respondent's Exhibit 1:

> "The independent auditor has two methods available for dating his report when a subsequent event disclosed in the financial statements occurs after completion of his field work but before issuance of his report. He may use "dual dating,"

> for example, 'February 16, 19..., except for Note.....as to which the date is March 1, 19...," or he may date his report as of the later date. In the former instance, his responsibility for events occurring subsequent to the completion of his field work is limited to the specific event referred to in the note (or otherwise disclosed). In the latter instance, the independent auditor's responsibility for subsequent events extends to the date of his report and, accordingly, the procedures outlined in section 560.12 generally should be extended to that date.

The appellant argues that his attempt to implement in writing Mr. Leabman's instructions were countermanded. The appellant had drafted a staff memorandum that stated:

> "Please make absolutely certain that all audit reports are dated as of the last day of field work. This does not mean the date of the exit conference unless it is held on the last day of field work."

Mr. Leabman testified that he did not permit this memo to be sent because he was concerned about disseminating in written form which might become available to BMA clients what might be considered an admission that theretofore the BMA had not been dating audit reports in complinace with GAAS. The appellant then made essentially the same statement to his staff verbally at a staff meeting. Subsequent to this meeting, the staff member whose job it was to review the Milwaukee audit report overlooked the incorrect date and it was signed by the appellant.

The appellant's argument is that he did what he could to implement Mr. Leabman's directive and that he should not be held accountable for a subsequent slip-up by a subordinate. However, the error in dating the Milwaukee report exposed the BMA to an additional and completely unecessary six weeks of potential liability for subsequent events with respect to one of the larger local units of government in the state. All that the appellant did with

Mr. Leabman's directive, both in the proposed memo and verbally, was to pass it along to his subordinates without a program or process for compliance. The Commission is of the opinion that the respondent correctly relied on this charge and that it is an appropriate element of just cause for the suspension in accordance with the Safransky test.

CHARGE 2 - SUSPENSION

The second charge with respect to the suspension alleges that on May 25, 1978, the appellant issued the Jefferson Meadows Care Center nursing home cost report audit with an error of $55,000 which should have been identified and corrected if there had been an adequate review.

The appellant argues that the GAAS did not apply to these nursing home audits, citing a "Medical Assistance Manual - Questions and Answers pertaining to the implementation of Federal Regulations on Reimbursement on a Reasonable Cost-Related Basis for Skilled Nursing and Intermediate Care Facility Services," published by HEW, Appellant's Exhibit WW, as follows:

> "Question 2:
> Must the requirement for the Statement of Opinion regarding the conduct of the audit be in accord with the requirements of the American Institute of Certified Public Accountants (AICPA)? (s. 250.306)(3)(ii)(F)).
>
> Answer:
> No, the opinion required is that the audit was conducted according to the requirements specified by the State."

However, the "state" has specified in the contract between DOR and DHSS specifically that the audits were to be accomplished in accordance with federal provisions that incorporated GAAS. Furthermore, Mr. Kriska, who administered the nursing home program in BMA, had no doubt that the audits were to be in accordance with GAAS. See T., X, pp. 170-171, 175:

Q. Does the opinion letter (Jefferson Meadows Care Facility) indicate what audit standards were used in connection with that matter?

A. Generally accepted auditing standards.

Q. Are those the standards that applied to Nursing Home Audits?

A. They're the standards that apply to all audits.

* * *

Q. ...if I understand you correctly, you're saying that the audit standards for your work is generally accepted auditing standards.
Is there any qualification or reservation to that?

A. No.

The appellant further argues that GAAS does not specify the number of vertical levels of review required, and that in fact there was review of this report in the central office. However, the testimony was that at this time, the only central office review was an editing of the finished product for spelling and grammar, and not a review to determine whether the audit had been done and the report prepared in accordance with GAAS. Mr. Kriska himself testified as follows:

A. ... I think either Jack Higgins or Dick Ashmore looked at the report before it went in for typing.

Q. Did they look at it for grammatical errors?

A. Bassically, I believe they were looking at it for spelling, punctuation.

Q. Now, that's not a review in accordance with generally accepted auditing standards, is it?

A. No.

* * *

> Q. Do you recognize, Mr. Kriska, that the review, such as it was in the case of the Jefferson Meadows Audit Report, was not in accordance with generally accepted auditing standards?
>
> A. Yes." T., X, pp. 176, 179,

Mr. Higgins, the BMA operations supervisor whose main responsibility was the review of audit report, testified as follows:

> "...I did, on occasion, read the reports but I was not doing an in-depth review because I was not - I was not familiar with the various State and Federal regulations but I may have edited the typed or handwritten manuscript for proper English things like that." T.,XI, pp. 68-69.

The Commission is of the opinion that the respondent properly relied on this charge with respect to the suspension of the appellant, and that it is an appropriate element of just cause for suspension in accordance with the Safransky test.

CHARGE 1 - DISCHARGE

The first charge in connection with appellant's discharge alleges that he failed to develop written policies and procedures for the evaluation of the internal controls of BMA clients, from at least June, 1977, until the development of an internal control questionaire for nursing home audits in the summer of 1978.

GAAS requires, see AU s. 320.01, Respondent's Exhibit, as follows:

> "There is to be a proper study and evaluation of the existing internal control as a basis for reliance thereon an for the determination of the resultant extent of the tests to which auditing procedures are to be restricted."

There are a number of ways in which internal controls can be studied and evaluated, see AU s. 320.53, Respondent's Exhibit 1:

> "Information concerning the system may be recorded by the auditor in the form of answers to a questionaire, narrative memoranda, flowcharts, decision tables, or any other form

that suits the auditor's needs or preferences."

The appellant in his brief attempts to transform the charge into a charge of not using, specifically, flowcharts or internal control questionaires, and then to rely on the principle set forth in the foregoing standard to demonstrate that questionaires or flowcharts are not specifically required. However, the charge is not so limited. It alleges that the appellant did not establish "written policies and procedures for the evaluation of the internal controls of your clients." The charge goes on to say that "Murray Dropkin reported to me he found no internal control procedures, questionaires, and/or checklists, which are the most practical way for an auditor to begin an evaluation of internal controls," Commission's Exhibit 1. The Commission understands the latter sentence to mean that no evidence of the most usual means of studying and evaluating internal controls was found in the BMA files, not that it was necessary for a particular format - questionaires or flowcharts-to be used.

It is unquestioned that the appellant, as charged, did not establish "written policies and procedures for the evaluation of the internal controls" of BMA clients. The record further shows that BMA audits were characterized by the absence of a proper study and evaluation of internal controls, and were deficiencies in this respect. For example, the accounting firm of Clifton, Gunderson & Co., performed a technical standards review of 13 audit reports issued by the BMA. The firm made the general observation that:

> "...regarding the fieldwork and general standards, deficiencies are evidenced by a lack of...evaluations of internal control..." Respondent's Exhibit 26, p. 2.

The report goes on to vote a lack of evaluations of internal control in a number of the files studied. The Murray Dropkin firm, as indicated, also noted a lack

of the proper study and evaluation of internal controls, and the Office of Revenue Sharing in its review of BMA auditing practices stated:

> "There was no indication in the working papers that internal control had been reviewed. Regardless of the size of the recipient or the auditor's familiarity with its accounting system, there should be full documentation in the working papers that internal control has been evaluated. We refer you to the AICPA Statement on Auditing Standards, Codification Section 338.05c." Respondent's Exhibit 68, p.4.

The Commission is of the opinion that the appellant failed to establish written policies and procedures for the evaluation of internal controls as charged, and that there was an absence of proper evaluation of internal controls by the BMA and deficient audits in this respect, and that the *Safransky* test was satisfied with respect to this charge.

CHARGE 2 - DISCHARGE

The second charge with respect to the discharge is that the appellant did not establish policies and procedures for obtaining client representations from at least since June, 1977.

The appellant argues that client representation letters are not required by GAAS by citing the following subsection of AU s. 333, Respondent's Exhibit 1:

> "333.03 The auditor obtains written representations from management relating to its knowledge or intent when he believes they are necessary to complement his other auditing procedures."

This subsection does not indicate that client representations are optional. It is a reflection of the fact that auditors must make professional judgments. AU s. 333.01 provides the general rule regarding client representations.

> "This section establishes a requirement that the independent auditor obtain certain written representations from management as a part of an examination made in accordance with generally accepted auditing standards and provides guidance concerning the representations to be obtained."

See also testimony of Thomas Stolper, a Clifton Gunderson partner, at T., IV, pp. 162-163.

It is not disputed that the appellant did not establish policies and procedures for obtaining client representations. This was causative of the failure of BMA to obtain client representations and accordingly to conduct deficient audits in this respect, and the Safransky test has been satisfied with respect to this charge.

CHARGE 3 - DISCHARGE

The third charge in connection with the discharge was that the appellant issued an audit report on March 31, 1978, with an unqualified opinion, prior to a complete review of the work papers by the field staff or central office audit review staff.

This charge involves a City of Milwaukee audit report. The appellant argues that if was reviewed in the central office by Jack Higgins and in the field by Duane Perry, the Chief Supervising Senior in the Milwaukee area. Mr. Perry's testimony included the following:

> "Q. When you were looking at those work papers were you reviewing them for compliance with generally accepted auditing standards?
>
> A. Not consciously.
>
> Q. Could you elaborate on what you mean by not consciously?
>
> A. I didn't review them in detail at that point, and I wouldn't have reviewed them with the thought in mind of complying with audit standards at that time.
>
> * * *
>
> Q. You said you reviewed some of the audit papers but some you did not. You did not review some because you had looked at them during the course of the audit, is that a fair statement?
>
> A. I believe so; yes." T., I, pp. 93, 96.

The work papers for the City of Milwaukee audit were not submitted to the central office until June or July, 1978, substantially after the report was

issued, see T., I, P. 102, so there could have been no central office review prior to the issuance of the report. See also, T. XI, pp. 79-80, testimony of John Higgins.

The issuance of this audit report without proper review constituted a violation of GAAS inasmuch as AU s. 230.01, Respondent's Exhibit 1, requires "due professional care." See testimony of Mr. Kitrosser, T. II, P, 35; Mr. Rittenburg, T., III, P. 57; Mr. Leisenring, T. III, P. 181; Mr. Stolper, T. IV. p. 75. This charge meets the criteria for just cause as set forth in Safransky.

CHARGE 4 - DISCHARGE

The fourth charge related to discharge is that the appellant failed to develop a proper plan or program in compliance with Mr. Leabman's directive of June 7, 1978, that he submit a plan that would assure that all work and review of documents would be completed prior to the March 31, 1979, Milwaukee City audit report and opinion letter. It is alleged that the appellant's response "lacked any plan for the assignment of personnel and the scheduling of work, for instructions to the personnel relative to the plan and for inspection to ensure that the plan was implemented." Commission's Exhibit 1.

The appellant's response to this directive was to draft the following memorandum:

"To: Central Office Supervisors and Municipal Auditors

Re: Dating and Release of Audit Reports

Effective immediately:

1. All audit reports will be dated as of the date the field work was completed.

2. No subsequent opinion(s) for the City of Milwaukee reports will be released until a central office supervisor has reviewed

> related worksheets to provide assurance, independent of staff making the audit, that proper audit procedures have been completed.
>
> 3. No subsequent audit reports will be released until a central office supervisor has reviewed the related worksheets.
>
> No deviations from these policies will be permitted!"
>
> Respondent's Exhibit 37, p. 4.

Rather than to develop a plan or procedure to ensure that Mr. Leabman's directive was carried out, the appellant essentially just passed along the directive to the appellant's subordinate staff.

The Commission is of the opinion that the respondent has satisfied its burden of proof as to this charge and that it satisfies the Safransky criteria.

CHARGE 5 - DISCHARGE

The fifth charge is that at least since June, 1977, and until June 7, 1978, when directed to discontinue the practice by Mr. Leabman, the appellant dated audit reports the date typing of the report commenced rather than the date of the completion of field work.

It is undisputed that BMA practice as to dating was as alleged. The appellant argues that there was no consensus of expert opinion as to dating practice and that the "language of GAAS is at best ambiguous." The appellant underscores the word "generally" in AU s.530.01, Respondent's Exhibit 1:

> "Generally, the date of completion of field work should be used as the date of the independent auditor's report."

As discussed above in connection with the first charge related to the suspension, the use of the work "generally" is related to the fact that there are certain specific cases where an auditor would use a date other than the date of completion

of field work. The BMA during the period in question consistently dated its reports the date they were typed. As to expert opinion, the only disagreement as to the proper method of dating in accordance with GAAS stemmed from the appellant. See the testimony of Mr. Dropkin, T., I, p. 44; Mr. Kitrosser, T., VIII, P. 130; Mr. Rittenburg, T. III, P. 53; Mr. Leisenring, T. III. P. 170; Mr. Stolper, T. IV. pp. 66-67. The appellant's testimony in this regard was strictly conclusory. See T. VII., P. 32:

> "Q. What would be the sense of dating an audit report after the completion of field work?
>
> A. Some valid reason.
>
> Q. Can you give me one?
>
> A. Following current practices and procedures."

The dating practice followed by BMA exposed it to substantial and unnecessary potential liability. The respondent has sustained its burden of proof on this charge and satisfied the Safransky criteria.

CHARGE 6 - DISCHARGE

The sixth charge alleges that at least since December, 1977, when the Nursing Home Cost Report Audit was signed, the appellant did not establish policies and procedures to ensure that BMA auditors independently verified the carrying values of fixed assets during the course of the nursing home cost report audits.

In connection with this charge, the appellant again argues that GAAS has no application to these audits. As discussed above, the Commission does not agree.

The Murray Dropkin report on its review of the BMA Nursing Home Cost Report audits, Respondent's Exhibit 20, contains the following comments:

"...the notes to the (Jefferson Meadows) report state that no verification was made of the fixed assets. This is not specifically referred to in the audit opinion.

* * *

The notes to many audit reports state that no independent verification was made of plant history. Large costs for buildings and/or other capital assets appear on the books of the nursing homes. Depreciation on these assets is included in the audited cost reports. Depending upon the materiality of the depreciation amounts, the BMA should consider qualifying their audit opinions based upon the above facts to put the readers of the reports on notice that such verification was not done.

* * *

Even absent generally accepted auditing standards, HIM-16 requires that the carrying values of fixed assets be independently verified by the auditor during the course of his examination." (emphasis supplied) pp. 10, 14-15.

Mr. Kriska, who was in charge of the nursing home audit program, testified as follows:

"Q. Sir, is it important in Nursing Home Cost Report auditing to be able to independently verify the carrying values of fixed assets.

A. Wasn't really that critical of an area for cost purposes.

Q. Why is that?

A. Well, the complexity of the State formula and the reimbursement that the homes received, the amount of money that was involved, wasn't usually that great. It was difficult, in many case, to determine or ascertain the carrying values of assets since many of those homes were built back about the turn of the century and there were no records available any longer to come up with the cost.

Where possible, we used other CPA's work and if they were our clients, then we'd use our own.

* * *

Q. All right. Now, how did you as you audited these various homes, if you did, attempt to verify the carrying values of fixed assets?

> A. In some cases we would look at sales and documents that were available to us, go to the Register of Deeds' office, get some idea of the transfer tax that was paid on the property, would indicate basically a sales price. We used other independent Certified Public Accountants' work where it was available.
>
> In some cases we had really no way of ascertaining whether or not the carrying value was correct but under the State formula I believe it was any home that was older than either 30 or 35 years they got no reimbursement under the formula for that facility on the original historical cost."
> T., X, pp. 149-151.

Mr. Kriska prepared an audit program for uses in nursing home audits. See Appellant's Exhibit K. This document at page 22 sets forth an audit program with respect to "Plant Equipment & Depreciation" which covers the verification of carrying values of fixed assets. At page 2 of the audit program it requires that as part of the prepatory phase of the audit the auditor "obtain, review, and be familiar with" a number of publications including HIM-16.

Upon examination of HIM-16, the Commission cannot agree with the statement of the Murray Dropkin firm in Respondent's Exhibit 20, cited above, that HIM-16 requires that the carrying values of fixed assets must be independently verified, if this is meant to imply that this is the case without exception. HIM-16 does set forth at pages 16-17, the procedures for auditing a provider's depreciation expenses, including the valuation of fixed assets. However, at page 2 of HIM-16 it also states:

> "...this guide is not intended to place a minimum or maximum limitation on the scope or extent of audit when, in the considered judgment of the auditor, fewer, additional or different procedures are considered necessary to fully accomplish the audit objectives. The relative importance or appropriateness of a given audit procedure can best be judged within the total context of a specific provider's operation, the adequacy of its accounting and statistics-gathering systems, related internal controls and other audit procedures employed. The materiality of a specific cost claimed and the potential for error in that

> cost should also determine the extent to which specific audit procedures are needed. In some circumstances (as where a provider's reimbursement is relatively small or where the auditor has access to and can rely upon the work of the provider's internal or independent auditors) the auditor should determine whether, and to what extent, specific audit procedures should be curtailed or omitted entirely." (emphasis supplied).

In some cases, including those where the depreciation item is very small or nonexistent, it would be appropriate not to independently verify the carrying values of fixed assets.

Therefore, the Commission is of the opinion that the respondent has failed to sustain its burden of proving that the appellant failed to establish policies and procedures to ensure that the BMA auditors independently verified the carrying values of fixed assets during the course of the nursing home cost report audits as required under the audit program of the federal government, nor has the respondent established that the BMA conducted audits that were deficient in this respect as a result of this allegation of inadequate performance by the appellant.

CHARGE 7 - DISCHARGE

The seventh charge in connection with the discharge is that at least since June, 1977, the appellant had not established policies and procedures to ensure proper documentation in audit working papers to show what documents were examined and what auditing tests were used in the performance of the audit.

The appellant argues that GAAS does not specify the form or content of working papers. While GAAS does not specify specifically what is to be in the working papers, the import of AU s. 338 is that the auditor must be able to support his or her opinion and representation as to compliance with GAAS either with working papers or by some other means:

AU s. 338.01:"...nor is there any intention to imply that the auditor would be precluded from supporting his opinion and his representation as to compliance with the auditing standards by other means in addition to working papers."

AU s. 388.02: "Working papers serve mainly to:
a. Aid the auditor in the conduct of his work.
b. Provide an important support for the auditor's opinion, including his representation as to compliance with the generally accepted auditing standards."

AU s. 388.03: "Working papers are the records kept by the independent auditor of the procedures be followed, the tests be performed, the information be obtained, and the concusions be reached pertinent to his examination."

If the working appers are inadequate, and there are no other indications in the audit file, there is no way to determine the adequacy of the audit conducted.

See testimony of Mr. Kitrosser, T. II, pp. 66-67:

"In looking at the working papers it was very difficult to tell what had or had not been done by the auditor...

* * *

What we found in working with the working papers was tick marks or check marks but I have no identification as to what, at this time, the marks mean or did not mean; so, in looking at it we could not tell what evidential matter the auditor examined.

In another instance the working papers just contained lists of numbers and no identification as to the number, where they came from, or what auditing they did off the financial information."

Mr. Lundteigen, the federal auditor, testified as follows:

"...we look at the working papers to determine to what extent do they support the opinion rendered and we found numerous deficiencies." T. XII, p. 43.

The report of the U.S. Office of Revenue Sharing of its review of BMA auditing policies contained the following statement:

"...Section 230.04 of the SAS Codification requires the content of the working papers to be sufficient to provide support for the opinion as well as indicating compliance with auditing

> standards. We noted little or no evidence in the working papers to document the audit work performed." Respondent's Exhibit 68, p. 4.

The respondent has sustained his burden of proof with respect to the charge and it satisfies the Safransky criteria.

CHARGE 8 - DISCHARGE

The eighth charge in connection with the discharge is that the appellant on June 19, 1978, **used** the Brickson Nursing Home audit report as an unqualified opinion notwithstanding that the working papers and the auditor's notes showed that verification of expenditures had not been made, due to inadequate and non-existent documentation.

The Murray Dropkin and Co. report contained the following statement in this regard:

> "The audit report of Brickson's Nursing Home, which is dated June 19, 1978 noted many situations in the working papers and the notes to the report where verification of expenditures was not done due to inadequate, improper or non-existent documentation. The working papers also noted the fact that the records were in such poor shape that the auditor could not determine proper cut-offs of expenditures at the beginning and end of the report period. In addition, no documentation existed for salary payments to the administrators of the nursing home.
>
> It is felt that based upon all the facts noted during the audit, consideration should have been given by the BMA to issuing an audit report which contained a "disclaimer of opinion." Respondent's Exhibit 20, P. 6. (emphasis added.)

Mr. Kriska testified as follows:

> "A. Certainly expenditures could not be verified because of lack of documentation; the majority of expenditures in the Cost Report we were able to verify either by documentation available at the facility, or by contacting a third party for verification.
>
> Q. Did you say that was true of a majority of the expenditures?

A. I would say, yes.

Q. And what portion of the expenditures could not be verified?

A. I would say probably around, between 20 and 25 percent.

Q. Would it be appropriate under the circumstances to issue an unqualified opinion if you could not verify 20 to 25 percent of the expenditures?

A. Yes; because the next question would be whether or not the expenditures were necessary in the operation of the nursing facility, and I would like to see you feed 20 people, three times a day, without expenditures, expending some money for food; and that's basically where most of the expenditures we could not verify, because he was paying cash for all his food at the grocery store because he couldn't get credit.

So, based upon the judgment in this case, my professional judgment as an auditor, I thought, you know, though I could not verify 100 percent of the expenditures, I was able to determine that enough of the expenditures there I could verify and the balance were probably necessary.

Q. Do you recall whether you documented that explanation in the working papers?

A. I don't know if I did or not. It may have been in the assignment memo, but you know, I'm not 100 percent certain." T., X, pp. 190-191.

AU s. 509, Respondent's Exhibit 1, provides in part as follows:

"10. The auditor can determine that he is able to express an unqualified opinion only if his examination has been conducted in accordance with generally accepted auditing standards and if he therefore has been able to apply all the procedures he considers necessary in the circumstances. Restrictions on the scope of his examination, whether imposed by the client or by circumstances such as the timing of his work, the inability to obtain sufficient competent evidential matter, or an inadequacy in the accounting records, may require him to qualify his opinion or to disclaim an opinion. In such instances, the reasons for the auditor's qualification of opinion of disclaimer of opinion should be described in his report.

11. The auditor's decision to qualify his opinion or disclaim an opinion because of scope limitation depends on

> his assessment of the importance of the omitted procedure(s) to his ability to form an opinion on the financial statements examined. This assessment will be affected by the nature and magnitude of the potential effects of the matters in question and by their significance to the financial statements. If the potential effects relate to many finanacial statement items, the significance is likely to be greater than if only a limited number of items is involved.

Based on all the material evidence, including Mr. Kriska's explanation, the Commission is of the opinion that the respondent has not sustained his burden of proof as to the contention that the issuance of this opinion as an unqualified opinion was a violation of AU s. 509.10. However, the facts with respect to this charge are probative of charge 7, which has to do with improper documentation in the working papers.

CHARGE 9 - DISCHARGE

The ninth charge relative to discharge is that on June 2, 1978, the appellant issued the Maple Lane Health Care Center audit report as an unqualified opinion, notwithstanding the facts that a daily cenus of patients was not taken and no review was made of payroll checks.

The Murray Dropkin and Company report, Respondent's Exhibit 20, contained the following comments:

> "The working papers for the audit of Maple Lanes Health Care Facility, report dated June 6, 1978, contain the comment that the payroll checks were at the courthouse, and therefore not reviewed...As noted in previous paragraphs, this is in violation of the third standard of field work.
>
> * * *
>
> The working papers also noted the fact that the Maple Lane Health Care Facility did not take a daily census of patients. This fact is not noted in the audit report. The auditor made the comment in the working papers that 'test of patient days based on available records.' It was difficult to determine from the working papers whether or not the auditor was able to perform sufficient alternative tests to satisfy himself as

to the patient day information included in the audit report." pp. 11, 12.

Mr. Kriska testified as follows:

"Q. Now, when you are auditing one of these nursing homes, when you are doing one of these cost reports regarding the nursing home audit, is it important that one check the daily census of patients or is it not?

A. All depends on the facility.

Q. All right. I direct your attention to the Maple Lane Health Care Center located in Shawano, Wisconsin.

A. Shawano - - or the Maple Lane Health Care Center probably was not a unique situation. There aren't that many facilities that we ran across that did a daily patient census. Most of the county homes had kept a patient log where they logged patients in and out and has a daily total but they don't actually go and physically inventory their patients on a daily basis and have a sheet with all the patients' names, indicating where they were located in the facility at the time.
Generally they would have a patient summary for the end of their fiscal year; that would be about it.

Q. All right. Do you know whether or not Maple Lane Health Care Center is a derivative from the old county home?

A. Yes; it is.

Q. Now, is it important in Nursing Home Cost Reporting to review payroll checks?

A. There again it would depend on the facility.

Q. Specifically, Maple Lane Health Care Center, Shawano, Wisconsin?

A. I wouldn't - - I would say that because of the size of the facility and that it was a county home, the review of payroll checks would not be a necessary audit procedures. Plus, in this situation, we do audit the county and the checks, payroll checks would have been located at the county and it would have been included as a part of the audit test of the general accounting facility.

Q. When you say 'we audited the county,' what county and who is we?

A. The Bureau of Municipal Audit audited Shawano County.

* * *

"Q. Now, we have in this proceeding another charge relative to Maple - - I shouldn't say another charge but a charge that pertains to Maple Lane Health Care Center and the charge says, 'A daily census of patients was not taken and no review was made of payroll checks.'

Let me ask you what you remember the facts to be as it - - whether there was no review of payroll checks?

A. I believe that I talked to the auditor who did the job and he did not verify any cancelled checks as part of the test of the payroll.

Q. How can you tell that somebody was paid if you don't look at an endorsed check?

A. There's the payroll itself. The circumstances of the facility - - I mean, you have a small nursing home up in the sticks; it's a small county. They probably know just about everyone that is employed at the nursing facility at the county; and the county treasurer is the one that cuts the checks, it's not done at the nursing facility.

I thought the controls were adequate in this particular instance; our looking at the cancelled payroll checks was an unnecessary audit procedure. I found nothing wrong with eliminating that particular procedure in this particular case.

Q. Isn't a cancelled check the best evidence of payment?

A. It's the best; yes; it's not the only.

* * *

Q. Now, in your opinion was it proper to issue an unqualified opinion when there had been no review of the payroll checks?

A. Yes.

Q. Why wasn't that review of the payroll checks made?

A. Well, the paychecks were not available at the facility and the auditor just didn't feel that it was worth the necessary trip into Shawano to look at them and he felt he could depend on our work - - BMA's work in auditing the county since we did do Shawano County and there probably was a payroll test done on the conty end of things.

Q. Were the payroll checks at the Shawano County Courthouse in downtown Shawano?

A. Yes.

Q. Where's the Maple Lane Health Care Center?

A. It's a few miles out of town."

T., X, 156-157, 191-192, 193-194.

AU s. 330, Respondent's Exhibit 1, states in part as follows:

"Sufficiency of Evidential Matter

.09 The amount and kinds of evidential matter required to support an informed opinion are matters for the auditor to determine in the exercise of his professional judgment after a careful study of the circumstances in the partiuclar case. In making such decisions, he should consider the nature of the item under examination; the materiality of possible errors and irregularities; the degree of risk involved, which is dependent on the adequacy of the internal control and susceptibility of the given item to conversion, manipulation, or misstatement; and the kinds and competence of evidential matter available.

.10 The independent auditor's objective is to obtain sufficient competent evidential matter to provide him with a reasonable basis for forming an opinion under the circumstances. In the great majority of cases, the auditor finds it necessary to rely on evidence that is persuasive rather than convincing. Both the individual assertions in financial statements and the overall proposition that the financial statements as a whole present fairly, in conformity with generally accepted accounting principles, the financial position are of such a nature that even an experienced auditor is seldom convinced beyond all doubt with respect to all aspects of the statements being examined.

* * *

12. An auditor typically works within economic limits; his opinion, to be economically useful, must be formulate within a reasonable length of time and at reasonable cost. The auditor must decide, again exercising professional judgment, whether the evidential matter available to him within the limits of time and cost is sufficient to justify formulation and expression of an opinion." (emphasis added.)

GASS does not require that the auditor in each case utilize the very best evidence that is obtainable. There is an appreciable degree of professional judgment and discretion involved in the determination of what constitutes sufficient evidential matter. Based on all of the evidence material to this charge, the Commission concludes that the respondent has not sustained his burden of proving that the issuance of the Maple Lane Health Care Center audit report as an unqualified opinion was a violation of GAAS and that it satisfied the requirements of the Safransky test.

CHARGE 10 - DISCHARGE

The tenth charge in connection with the discharge was that on June 8, 1978, the appellant issued the Wisconsin Lutheran Child and Family Service, Inc. audit report as an unqualified opinion, notwithstanding the fact that the workpapers were not complete since the payroll and revenue sections of the internal control questionaire were not complete.

The Murray Dropkin and Co. report, Respondent's Exhibit 20, states at part 13 with respect to this audit as follows:

> "a. The audit program and internal control questionaire were not properly completed. One of the items in the audit program not indicated as being done was the examination of cancelled payroll checks. The payroll and revenue sections of the internal control questionaire were left completely blank."

Mr. Kriska testified as follows:

> "Q. Can you, as an auditor, issue an unqualified opinion where the payroll section - sections of the internal control questionaire are not completed?
>
> * * *
>
> A. Yes, internal control questionaires and the audit programs are guides and they are basically used by auditors as a guide

to doing an audit. They're not chiseled in stone, they deviate from them and they can use their professional judgment in conducting an audit.

In this particular case this was a relatively inexperienced auditor, it was his first audit. He did the work, he just neglected to fill out the form.

Q. How do you know he did the work?

A. He had work papers to document he was involved with the payroll, work papers, you had to figure he had to do something.

* * *

Q. Whether to issue a clean opinion or not somewhat turns on just how much information was lacking from the questionaire and checklist?

A. No. It does not indicate the work was not done, it's just that the form was not filled out.

Q. Do you know whether the equivalent to the material that would normally go into the checklist was reported elsewhere in those working papers?

A. I would - I don't know. I would say probably that most of what was in the report probably was done. The steps were completed in the course of doing the payroll for verification. Its just that it was never filled out."

T., X. pp. 194-196.

An internal control questionaire is not the only way to study and evaluate internal controls. See AU s. 320.53, Respondent's Exhibit 1.

"Information concerning the system may be recorded by the auditor in the form of answers to a questionaire, narrative memoranda, flowcharts, decision tables, or any other form that suits the auditor's needs or preferences."

Mr. Kriska testified that there was other evidential matter which demonstrated that the work encompassed by the blank sections in the internal control questionaires had in fact been accomplished. In the opinion of the Commission, the

respondent has not satisfied his burden of proving that the issuance of the Wisconsin Lutheran Child and Family Services audit report as an unqualified opinion was in violation of GAAS and satisfied the Safransky criteria.

CHARGE 11 - DISCHARGE

The eleventh charge with respect to the discharge alleges that on September 29, 1978, the appellant submitted a report to the regional office of the Office of Revenue Sharing, U.S. Department of the Treasury, which indicated that the BMA used GAAS in 12 federal revenue sharing audits during the quarter ending September 30, 1978. It is further alleged that the appellant knew that such standards were not employed by the BMA, contrary to the federal regualtions regarding those audits, with respect to the absence of evaluation of internal controls, the failure to obtain client representation letters, and the absence of required references in the working papers as required by GAAS.

The failure of BMA to conduct its audits in accordance with these particular standards have been established in connection with three previous charges related to the discharge - charge one as to internal controls, charge two as to client representations, and charge seven as to working papers. Of particular relevance to this charge is the report of the Office of Revenue Charing's review of BMA audits, Respondent's Exhibit 68, which stated that "...examination of the work-papers indicated signigicant deviations from generally accepted auditing standards," page 2, and mentioned, among other things, specific problems with the study and evaluation of internal controls, work papers, and letters of representation.

Furthermore, the appellant knew or should have known that the BMA was not conducting its audits in accordance with GAAS if for no other reason than that the Basic BMA problems were discussed in reports from the Murray Dropkin and Co.

dated June 6, 1978, Respondent's Exhibit 8, and July 13, 1978, Respondent's Exhibit 9. There had been no changes in BMA practices or policies since these reports which would have brought the BMA into compliance with GAAS with respect to the enumerated deficiencies.

The Commission is of the opinion that the respondent sustained his burden of proof with respect to this charge and satisfied the Safransky criteria.

WHETHER THE ESTABLISHED CHARGES SUPPORT THE DISCHARGE IMPOSED

Taken as a whole, the charges established by the respondent meet the Safransky test in that they can reasonably be said to have a tendency to impair the appellant's performance of the duties of his position and the efficiency of the BMA. Thus there is a basis for the imposition of discipline. The next question is whether the amount of discipline imposed was excessive.

In Hess v. DNR, Wis. Pers. Commn., 79-203-PC (8/19/80), the Commission discussed its role in reviewing the amount of discipline imposed:

> "In the opinion of the Commission, the appropriate review of the amount of discipline imposed in the normal case is a review on the merits, with the discipline to be modified if, under all the circumstances, the amount of discipline is determined to be 'excessive.' See Black's Law Dictionary, Revised Fourth Edition, p. 670: 'Tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure.'"

The appellant extends that the "question restated is whether or not the agency had '... open to it a less drastic way of satisfying its legitimate interest...'" However, this standard applies only to a First Amendment case such as Hess. See Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2873-2685 (1976).

Under all of the facts and circumstances of this case, the Commission is of the opinion that the respondent's decision to discharge the appellant was not

"markedby excess," nor did it exceed "the proper or reasonable limit or measure."

The bureau of municipal audit is an important part of state governemnt. Its role is significant - to conduct audits of local units of government, and, in the case of nursing homes during the period in question, other entities, and to provide reports that are relied on for important decisions by government officals, citizens, and the financial community. The position of BMA director is a high level job with very important responsibilities. On this record it is clear that notwithstanding the charges which were not sustained, there were many serious problems with the operation of BMA with respect to its accounting practices that were attributable to the appellant as director. Given the scope and nature of the BMA function, these deficiencies carried extensive implications to the state in terms of potential lost clients and exposure to possible liability.

The appellant, who had been BMA director since 1970, demonstrated recalcitrance in acknowledging the need for and effectuating changes in the BMA operation. For example, in his discussion with Mr. Leabman on October 30 or 31, 1978, he referred to the representation to the Office of Revenue Sharing that the BMA conducted its revenue sharing audits in accordance with GAAS as a "technicality." Another example occurred following his suspension, in part for misdating the City of Milwaukee audit report issued July 27, 1978, when the appellant filed a noncontractual grievance. In that grievance he in essence denied that GAAS requires that audit reports normally should be dated as of the last date of field work:

> "It should be noted that the procedure in question in not mandated by Section 530.01. The Administrator's interpretation of that section is accordingly inappropriate for the second time... The bureau has not incurred any liability or reaction for post or predating audit reports during more than 65 years of operation. Respondent's Exhibit 57.

This constituted a message to the division administrator that although the appellant

had attempted to comply with his directive on the dating of audit reports, he still either did not understand or did not agree with the GAAS requirements on dating. It has been demonstrated on this record by the overwhelming weight of the expert opinion and other evidence that the appellant's views on dating audit reports were contrary to GAAS and left the BMA open to lengthy and completely unnecessary periods of potential liability.

The dimensions of the problems with BMA and the recalcitrance of the appellant were significant factors supporting the removal of the appellant from the position. There were mitigating factors, primarily the length of appellant's service, both with BMA and in the director's position, his generally favorable performance evaluations and the fact that BMA policy and procedures had been of long standing. Tied in with this last factor is the question of whether GAAS applied to BMA auditing. Implicit in appellant's position is that this was at best a thorny question and that regardless of how it might be resolved after the fact, he should not be held responsible for a difference of professional opinion. At least one major problem with this position is that the applicability of GAAS in general to the BMA was not simply an abstract question to be decided by a process of deduction from general principles. As has been discussed above, in addition to the expert opinion and court cases which looked to GAAS as a measure of due care, GAAS specifically was required by the nursing home contract, the federal revenue sharing requirements, and the Wisconsin Administrative Code prohibition on a CPA signing a report "in such a manner as to imply that he is acting as an independent public accountant, unless he has complied with the applicable generally accepted auditing standards..." s. Accy 1.202(1), Wis. Adm. Code. This is not a case where the appellant is being held responsible for a dispute of professional opinion.

Furthermore, even if the respondent had felt that a demotion were called for, there were no available positions for demotion at the time.

COLLATERAL MATTERS

The appellant argues that the agency had an obligation to warn him under threat of discharge that his conduct was unacceptable. He cites Schroeder v. UW, Wis. Pers. Bd. No. 73-24 (2/21/57) as follows:

> "Finally, we are disturbed by the fact that Appellant does not seem to have been given any kind of admonition by his supervisor, Sorenson, or by any other superior, that his use of Varga was bringing him perilously close to discharge. Sorenson testified that he visited Appellant's Smith Hall work station many times between January 2 and January 15, 1973, yet never a word of warning appears to have been conveyed to Appellant. Appellant, without ever being admonished or given a chance to explain his actions, was confronted on January 16, 1973, with the fait accompli of a letter of discharge. This does not appear to uw to be a wise much less a fair way to treat employes."

In that case, the board found that the respondent employer had not satisfied his burden of proving that the appellant, a painter, wilfully disobeyed an agreement that he would use his assistant for certain duties and as time allowed train him to assist in actual painting. In this context, the comment quoted above basically is dictum. There is no requirement of a prior warning as argued for by the appellant in the statutes or administrative code rules. Furthermore, the record in the instant case demonstrates that the appellant was warned by his supervisor that he was dissatisfied with his performance.

The appellant also argues that the employer never issued any orders or directives to the appellant as to its desires, and that this constituted error. The appellant, a CPA, was in charge of a bureau which performed audits. It cannot be contended that the division administrator, who was not a CPA, had an obligation to give the appellant an order to run the bureau in accordance with appropriate professional

standards, although in point of fact a number of directives and orders were given. The Commission also disagrees with the appellant's contention that he was being held to an error-free standard of performance.

The appellant argues that progressive discipline was required but not followed. The civil service statutes and personnel rules do not require progressive discipline. Appellant's Exhibit W, "Guidelines for Handling Disciplinary Action," which was promulgated by the director, bureau of personnel, pursuant to then s. 16.28 (1)(c), Stats., (1975), subsequently renumbered by ch. 196, Laws of 1977, to s.230.34(1)(c), Stats., provides: "The administrator shall establish guidelines for uniform application of this (disciplinary) authority among the various agencies." However, even this document does not require that in all cases progressive discipline be followed, and recognizes that in some cases discharge is appropriate without intervening lesser discipline.

The appellant also contends that an employe may not be disciplined for inefficiently performing work outside a civil service classification and that because GAAS is not mentioned either in his position description or the class specifications for his position, that GAAS cannot be considered part of his work. This argument has been discussed and rejected above.

The appellant further argues that he was not given all of the staff and money he requested and needed. It is not unusual for a state agency not to get everything it requests. However, there is no basis on this record to conclude that the charges found to have been sustained by the respondent were substantially the result of inadequate funding. Furthermore, the appellant's own testimony was as follows:

"Q. Wasn't it your experience in the BMA that you could

always get positions with relative ease since it didn't involve any of the general taxpayer's money because the people worked and generated the revenue themselves?

A. Generally, that was the true." T., XIII, p. 125.

The appellant argues that there was "no legally cognizable impact on its operation caused by Alff's alleged shortcomings," in that BMA has not been sued or suffered any liability. The appellant cites no authority in support of the argument that some "impact" is a prerequisite, and the Safransky holding provides contrary authority:

> "... one approriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." 62 Wis. 2d at 474. (emphasis supplied).

A collateral evidentiary matter involves the appellant's assertion in his brief that it was error to have received in the record certain reports of accountants summarizing their review of various BMA audit files. It is argued that these reports constitute inadmissible hearsay.

In Johnson v. Misericordia Hospital, 97 Wis. 2d 521, 547-548, 294 N. W. 2d 501 (Ct. of Appeals, 1980), the court discussed the admissibility of, among other things, a report of a hospital's medical executive committee dealing with the investigation and suspension of a physician. The trial court admitted the document and the Court of Appeals affirmed:

> "We note that McCormick, in his treatise on evidence, has discussed the disadvantage of excluding such evidence and advocates the approach we adopt.[13]

[13] See also Nail v. State, 231 Ark. 70, 328 S.W. 2d 836 (1959) where the court allowed into evidence a composite report, compliled from the findings of fourteen state hospital physicians. The report was held admissible despite the

> defendent's objection that he had no opportunity to examine the unnamed persons whose findings were included in the report.
>
> 'Thus, evidence as to the purport of 'information received' by the witness, or a statement of the results of investigation made by other persons, offered as evidence of the facts asserted out of court, have been held to be hearsay. While in theory this approach may be applicable to such situations as the collective decision of a group of doctors, reached after consultation, the result is either the loss of valuable and reliable data or extreme awkwardness in presenting it. It is suggested that the hearsay ban ought not to apply either on the theory that cross-examination requirements are satisfied by the availability of one of the participants in the joint decision, or by analogy to the view that expert opinions may be based in part on observed data and in part on reports by others.'"

In the instant case, the argument for admitting the reports is even more persuasive as the authors of the report were called as witnesses by the respondent and were available for cross-examination. The Commission also notes that extensive discovery was had in this case and that the appellant was granted a postponement of the commencement of the hearing to give him an opportunity to depose the author of the Clifton Gunderson report.

Another question was raised with respect to the materiality of the Clifton Gunderson report, Respondent's Exhibit 26. This report is relevant to some of what may be characterized as the more "general" charges - e.g., charge 2 (discharge) alleges that "at least since June, 1977, you did not establish policies and procedures for obtaining client representations..." The admission of this report is evidence relative to these charges and does not constitute the addition of new charges, as the appellant contends. The Commission affirms the written decision of the examiner dated June 13, 1980, which denied appellant's motion to auppress the Clifton Gunderson report.

There is a collateral matter concerning witnesses which the Commission must address. The appellant asks the Commission to overrule the decision of the hearing examiner dated June 13, 1980, which ordered certain subpoenas quashed unless certain sums were tendered to the witnesses. A copy of this decision is attached hereto, and the findings and conclusions set forth therein are incorporated by reference and adopted as the Commission's own as if fully set forth.

In brief, this matter concerns two CPA's, residents of New York and New Jersey, who testified on behalf of the respondent. Upon the conclusion of their testimony, the appellant declined to cross-examine, indicating that they would be called adversely as part of the appellant's cases. Following their direct testimony, the appellant subpoenaed them to appear at the continued hearing date several weeks in the future, and tendered $50.00 to each witness for fees and expenses. The examiner ordered that the subpoenas be quashed if certain additional fees and expenses as set forth in an affidavit were not tendered.

The appellant cites a number of authorities which recognize that it is a citizen's obligation to appear and testify when subpoenaed, notwithstanding that statutory fees frequently do not begin to compensate the witness for his or her time, expense, and loss of earnings.

If the sole basis for the respondent's motion to quash the subpoenas was the fact that the statutory witness fees and expenses did not cover the actual value amount of their expenses, then his point possibly might be well-taken. However, the key point is that when subpoenaed by appellant, these witnesses had already traveled a considerable distance to Wisconsin to appear and to testify, and had been available for cross-examination, which appellant waived. Under

these circumstances, to serve them with subpoenas before they leave the jurisdiction and thus to require them to return to Wisconsin for adverse examination by the appellant is unjust and oppressive. Compare, Securities and Exchange Commission v. Arthur Young & Co., 584 F. 2d 1018, 1033 (D.C. Cir. 1978):

> "There is a continuing general duty to respond to governmental process, in consequence, subpoenaed parties can legitimately be required to absorb reasonable expenses of compliance with administrative subpoenas. It follows that the power to exact reimbursement as the price of enforcement is soundly exercised only when the financial burden of compliance exceeds that which the party ought reasonably be made to shoulder. And what is reasonable will depend - as over the legal spectrum it ultimately does - upon the circumstances of each case."

ORDER

The respondent's actions suspending and discharging the appellant are affirmed and these appeals are dismissed.

Dated Oct. 1, 1981

STATE PERSONNEL COMMISSION

Gordon H. Brehm
GORDON H. BREHM
Chairperson

Donald R. Murphy
Donald R. Murphy
Commissioner

AJT:mgd

Parties
Mr. Roger Alff
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Mr. Mark Musolf
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125 South Webster
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DISSENT

This dissent does not take issue with the majority decision that respondent has established just cause for discipline of the appellant, both for the initial three day suspension and for additional discipline based upon seven of the eleven charges contained in the discharge letter. However, under all the facts and circumstances, discharge constituted excessive discipline. The action of the respondent should be modified by providing for a suspension of 30 days without pay.

Dated: Oct. 8, 1981

Charlotte M. Higbee
CHARLOTTE M. HIGBEE
Commissioner