

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 663/ January 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13797

In the Matter of	:	
	:	ORDER DENYING MOTION TO
GERARD A. M. OPRINS, CPA, and	:	CORRECT A MANIFEST ERROR
WENDY McNEELEY, CPA	:	OF FACT
	:	

The Securities and Exchange Commission (Commission) issued a Corrected Order Instituting Proceedings on March 1, 2010, pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice. On December 28, 2010, I issued an Initial Decision ordering that Wendy McNeeley, CPA (McNeeley), be temporarily denied the privilege of appearing or practicing before the Commission as an accountant for one year and dismissing the proceeding as to Gerard A.M. Oprins, CPA. (Initial Decision Rel. No. 411.) On January 10, 2011, McNeeley filed a Motion to Correct a Manifest Error of Fact (Motion), pursuant to 17 C.F.R. § 201.111(h) (Rule 111(h)). The Division of Enforcement (Division) filed its Opposition to Respondent McNeeley’s Motion to Correct a Manifest Error of Fact (Opposition) on January 14, 2011.

McNeeley’s Motion

McNeeley urges removal of the finding in the Initial Decision that “[McNeeley] knew or should have known about any additional tax distributions in early 2005.” (Motion at 2.) At issue in the Motion are factual findings pertaining to the Subsequent Review Testing:

As part of the audit procedures for 2004, the audit team performed subsequent review testing, which is a substantive audit procedure designed to gather evidence about the reasonableness of account balances as of December 31, 2004, by reviewing transactions occurring after that date. (Tr. 929.) The workpapers indicated that disbursements during the period January 1, 2005, through March 31, 2005, were reviewed for significant unusual items. (Tr. 931-32; Div. Ex. 60 at 27-28.) McNeeley performed the review, noting “no unusual items,” and no additional documentation was included in 2004 audit workpapers. (Div. Ex. 60 at 27; Tr. 931-33.)

However, AA Capital's 2005 accounts receivable schedule revealed several significant additional advances to Orecchio, including multiple disbursements on the same day. (Tr. 932-33; Div. Ex. 92.) During January and February 2005, AA Capital made nine disbursements to Orecchio totaling \$482,000, described as "J.O. taxes," "JO Tax Distrib," or "JO Tax Dist."¹ (Div. Ex. 92 at EYZ000798.) This meant that prior to E&Y's issuance of the 2004 Audit reports, McNeeley knew or should have known that the \$1.92 million in Transfers had increased to over \$2.4 million. (Div. Ex. 98 at 42.)

(Initial Decision at 11; Motion at 2-3.)

McNeeley contends that Division Exhibit 60, the Program for General Audit Procedures (PGAP)—credited as evidence that she reviewed disbursements during the period January through March 31, 2005, and noted "no unusual items" —provided "no evidence whatsoever that [she] or anyone on the audit team was aware of additional tax distributions to Mr. Orecchio during January or February 2005 in the amount of \$482,000—or in any amount, for that matter." (Motion at 3.) McNeeley notes that "[t]he PGAP does not mention what records were reviewed or what disbursements they did or did not include, and it does not mention tax distributions or amounts totaling \$482,000." (Motion at 3.)

McNeeley acknowledges that the 2005 accounts receivable, admitted into evidence as Division Exhibit 92, shows tax distributions in January and February 2005, but argues that because that schedule includes entries dated throughout all of 2005, this schedule did not exist at the time of the 2004 audit, and thus could not have been known to her. (Motion at 3, 6.) McNeeley emphasizes that the Division asked her no questions about subsequent review testing at the hearing, nor did the Division ask any other witnesses any questions on the subject, instead relying solely on its own expert, John Barron. (Motion at 4.)

Thus, the crux of McNeeley's Motion is two-fold: (i) to prove her awareness, the Division and its expert relied solely on the 2005 receivable schedule, a document that allegedly did not exist at the time McNeeley performed the work (Motion at 4, 6); and (ii) the Division failed to satisfy its burden of proof establishing that she was aware of the additional distributions, despite ample opportunity to do so (Motion at 4-5).

Division's Opposition

The Division contends that McNeeley's Motion is not a proper motion to correct a manifest error of fact under Rule 111(h). (Opposition 2-3.) The Division argues that McNeeley's Motion simply disagrees with this Court's weighing of the evidence and inferences drawn from that evidence. (Opposition at 3.) Moreover, the Division notes that McNeeley does not claim that this Court misread or misunderstood any testimony or document, but rather erred

¹ On February 22, 2005, a single disbursement was made to Orecchio in the amount of \$266,000. On the same date, a second disbursement was made to him in the amount of \$14,000. (Div. Exs. 92 at EYZ000798, 98 at 42.)

in finding that the Division met its burden of proof with respect to a specific factual finding. (Id.) The Division contends that, at best, McNeeley’s argument is appropriate for a petition for review by the Commission. (Id.) With regard to the merits of McNeeley’s argument, the Division notes that it was permitted to rely on circumstantial evidence to satisfy its burden of proof and McNeeley had adequate opportunity to challenge that evidence. (Opposition 3-4, 7-8.)

Conclusion

A motion to correct a manifest error of fact in an initial decision is correctly made “only if the basis for the motion is a patent misstatement of fact in the initial decision.” 17 C.F.R. § 201.111(h). To support changing a factual finding in an Initial Decision, McNeeley must show that the patent misstatement of fact is “readily visible or intelligible: obvious,” (vFinance Investments, Inc., 94 SEC Docket 12605 (Dec. 11, 2008) (citing Merriam-Webster’s Collegiate Dictionary, 849 (10th ed. 2001))), or “an error that is plain and indisputable, and that amounts to a complete disregard of . . . the credible evidence in the record.” (MarketXT, Inc., 87 SEC Docket 193 (Jan. 5, 2006) (quoting Black’s Law Dictionary 563 (7th ed. 1999))). McNeeley has not made this showing.

All of the facts stated in the Subsequent Review Testing (see Initial Decision at 11) were cited to witness testimony and/or exhibits admitted into evidence that I credited. McNeeley had ample notice and time throughout the hearing to cross-examine witnesses, including the Division’s expert, on McNeeley’s subsequent review testing, and chose not to do so. Thus, McNeeley’s arguments go to the weight of the evidence and the inferences drawn from the facts as a whole; they do not constitute a patent misstatement of fact. The Motion contains arguments more appropriate to be raised in a petition for review of the Initial Decision filed pursuant to Rule 360 of the Commission’s Rules of Practice.

For the foregoing reasons, McNeeley’s Motion to Correct a Manifest Error of Fact is DENIED.

SO ORDERED.

Robert G. Mahony
Administrative Law Judge