

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **THE PROFESSIONAL CONDUCT COMMITTEE** and a cross-appeal by **MICHAEL LAWRENCE GARY, CA**, a member of the Institute, of the Decision and Order of the discipline committee made on July 22, 1999, pursuant to the bylaws of the Institute, as amended.

TO: Michael Lawrence Gary, CA
216 Glenayr Road
TORONTO, Ontario
M5P 3C3

AND TO: The Professional Conduct Committee, ICAO

ORDER MADE MARCH 3, 2000

HAVING heard and considered the submissions on behalf of the professional conduct committee, and the evidence and submissions on behalf of Michael Lawrence Gary, upon the appeal of the professional conduct committee and cross-appeal of Mr. Gary, respectively, of the Order of the discipline committee made on July 22, 1999, the appeal committee orders:

1. THAT the appeal of the professional conduct committee is dismissed.
2. THAT the cross-appeal of Mr. Gary is allowed in part, by declaring the commencement date of Mr. Gary's suspension pursuant to paragraph 3 of the discipline committee's Order to be December 13, 1999, being the date upon which the Decision and Order would have become final under the bylaws, and the said suspension would have commenced, in the absence of the appeal brought by the professional conduct committee.
3. THAT in all other respects the discipline committee's Decision and Order is confirmed, and is final under the bylaws as of March 3, 2000, all other time periods stipulated therein taking effect from that date.

DATED AT TORONTO THIS 10TH DAY OF MARCH, 2000
BY ORDER OF THE APPEAL COMMITTEE


BRYAN W. STEPHENSON, BA, LLB
SECRETARY - APPEAL COMMITTEE

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TO: Michael Lawrence Gary, CA
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TORONTO, Ontario
M5P 3C3

AND TO: The Professional Conduct Committee, ICAO

DECISION AND REASONS FOR DECISION MADE MARCH 3, 2000

This appeal filed by the professional conduct committee, and cross-appeal filed by Mr. Michael Lawrence Gary, were heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on March 3, 2000.

Mr. Paul Farley appeared on behalf of the professional conduct committee, and sought to vacate the paragraphs of the discipline committee's order made on July 22, 1999 relating to suspension, medical reporting, and supervised practice, and substituting therefor the expulsion of Mr. Gary.

Mr. Larry Banack appeared for and with Mr. Gary, whose cross-appeal sought to vary the discipline committee's order so as to have the period of suspension ordered run from either the date the discipline committee's decision and order was issued, being September 7, 1999, or the date the committee's reasons were issued, being November 2, 1999.

After reviewing the evidence filed, and listening to the submissions of the parties, the appeal committee made the following order:

ORDER MADE MARCH 3, 2000

HAVING heard and considered the submissions on behalf of the professional conduct committee, and the evidence and submissions on behalf of Michael Lawrence Gary, upon the appeal of the professional conduct committee and cross-appeal of Mr. Gary, respectively, of the Order of the discipline committee made on July 22, 1999, the appeal committee orders:

1. THAT the appeal of the professional conduct committee is dismissed.
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3. THAT in all other respects the discipline committee's Decision and Order is confirmed, and is final under the bylaws as of March 3, 2000, all other time periods stipulated therein taking effect from that date.

The parties were advised that written reasons would follow in due course, and these are those

reasons.

THE DISCIPLINE COMMITTEE'S ORDER UNDER APPEAL

After finding Mr. Gary guilty of four charges of professional misconduct, the discipline committee made the following order on July 22, 1999:

1. THAT Mr. Gary be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Gary be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Gary be and he is hereby suspended from membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Gary provide, at his expense, to the director of standards enforcement:
 - (a) medical reports from his doctor to confirm that, according to urine testing and/or such other testing as the doctor considers appropriate, Mr. Gary has continued since the date of the previous medical report to abstain from the use of cocaine. The first such medical report shall be provided within one (1) month from the date this Decision and Order becomes final under the bylaws, and each subsequent medical report shall be provided within one (1) month from the date of the previous medical report.
 - (b) reports from his psychiatrist to confirm that Mr. Gary has continued since the date of the previous report to take such medical treatment, including individual counselling, anti-depressant treatment and continued follow-up at the Donwood Institute, as the psychiatrist considers appropriate to deal with Mr. Gary's cocaine addiction. The first such report shall be provided within one (1) month from the date this Decision and Order becomes final under the bylaws, and each subsequent medical report shall be provided within six (6) months from the date of the previous report.
5. THAT Mr. Gary be and he is hereby required to complete a period of supervised practice upon the following terms and conditions:
 - (a) the term of the supervised practice shall be five (5) years from the date this Decision and Order becomes final under the bylaws;
 - (b) the cost of the supervised practice shall be borne by Mr. Gary;
 - (c) the supervisor shall report to the professional conduct committee every six (6) months;
 - (d) Mr. Gary shall nominate the supervisor, who shall be a member of the Institute in good standing, and shall advise the professional conduct committee of his choice of supervisor within thirty (30) days from the date this Decision and Order becomes final under the bylaws;
 - (e) the supervisor shall review all files pertaining to audit, review and compilation engagements, and shall evidence such review by signing the working papers prior to release of the financial statements.
6. THAT in the event there is a material change in circumstances, either Mr. Gary or the professional conduct committee may apply to the chair of the discipline committee at an assignment hearing for the modification of a term or terms of paragraph 4 or 5 of this Order, provided it shall not be open to Mr. Gary to apply to modify or alleviate either his obligation to provide continuing satisfactory evidence of his uninterrupted abstinence from the use of cocaine, or the consequence of expulsion for failure to provide such evidence.

7. THAT notice of this Decision and Order, disclosing Mr. Gary's name, be given after this Decision and Order becomes final under the bylaws:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
8. THAT Mr. Gary surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Gary. In the event Mr. Gary fails to surrender his certificate of membership within this ten day period, his suspension pursuant to paragraph 3 shall be extended one day for each day the certificate remains undelivered to the secretary.
9. THAT in the event Mr. Gary fails to comply with a requirement of this Order within the time period specified, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified in paragraph 7 hereof, and in *The Globe and Mail*.

THE GROUNDS FOR APPEAL

The Appellant's Submissions on the Appeal

Counsel for the professional conduct committee submitted that:

- The discipline committee improperly applied the sentencing principles of specific and general deterrence and rehabilitation to the facts of the case before it, and erred in placing too much weight on the principle of rehabilitation.
- The discipline committee erred in law in failing to properly consider and apply precedent, and thereby imposed a penalty outside the range of penalties generally imposed for similar misconduct.

Mr. Farley submitted that by making the above errors, and not expelling Mr. Gary, the discipline committee failed to meet the ultimate mandate of the Institute, being the protection of the public, and that it was therefore the responsibility of the appeal committee to overrule the decision of the discipline committee. He placed before the panel numerous prior disciplinary cases involving theft from a client or an employer, where the members were expelled regardless of the mitigating circumstances and compelling explanations offered for their actions. The professional conduct committee's position was that, in failing to expel Mr. Gary, the discipline committee imposed a penalty outside the range of penalties generally imposed for similar misconduct, and in so doing failed to place adequate importance on the principle of general deterrence.

The Respondent's Submissions on the Appeal

Mr. Banack responded to Mr. Farley's submissions as follows:

- The sanctions imposed by the discipline committee did not place too much weight on the principles of rehabilitation to the detriment of the principles of general and specific deterrence, in that the five years of supervised practice, and the continuing medical and psychiatric testing, were in fact quite onerous sanctions, which imposed upon the member both significant financial burden and deep personal embarrassment for a prolonged period of time, and which therefore constituted significant general deterrence to other members.

- The discipline committee did not err in law in failing to properly consider and apply precedent, since the committee applied the principle set out in all the precedent cases, that whether or not the misconduct warrants expulsion is dependent upon the unique circumstances of the case before the panel, in particular the mitigating and aggravating circumstances. The misconduct in this case was the result of an illness, an addiction which had not previously been dealt with by the discipline committee. The facts of the case, which were not disputed, and the evidence and testimony given at the discipline committee hearing, allowed that committee to draw a distinction between this case and previous cases involving theft from a client, and to make its decision on the basis of the numerous significant mitigating circumstances in this case. In making its order as to sanction, the discipline committee recognized that mitigating circumstances do not excuse a member's misconduct, but do help shape the appropriate penalty.
- Permitting Mr. Gary to continue as a member, on the condition he provide continuing evidence of his abstention from the use of cocaine, would adequately protect the public, as the only misconduct in Mr. Gary's career arose from his drug use.

The Respondent's Submissions on the Cross-Appeal

Submitting that Mr. Gary acknowledged the appropriateness of the severity of the sanctions imposed by the discipline committee, Mr. Banack requested the appeal committee to vary paragraph 3 of the discipline committee's order suspending Mr. Gary from membership, by stipulating the commencement date of the suspension as the date of issue of either the decision and order, or the reasons, of the discipline committee. Mr. Banack submitted that it would be unfair to suspend his client now for three months, given that:

- the discipline hearing occurred on June 10 and 11, 1999;
- the discipline panel's deliberations, and the disclosure of its order to Mr. Gary, occurred on July 22, 1999;
- the discipline committee's written decision and order was issued on September 7, 1999;
- the discipline committee's reasons for its decision and order were issued on November 2, 1999; and
- the professional conduct committee's notice of appeal was filed on November 24, 1999.

Mr Banack submitted that the timing of the above events following the hearing, which had been beyond the control of Mr. Gary, had delayed the commencement of his client's period of suspension, and that, as Mr. Gary had subjected himself to a voluntary suspension from public practice since approximately March 1998, the appeal committee should vary the order in respect of the commencement date of the suspension out of fairness to the member.

THE PANEL'S DETERMINATION

The appeal committee considered the submissions made, and determined as follows:

- It was clear from the discipline committee's reasons that it had given due regard to prior cases involving similar misconduct, and concluded that whether or not misconduct warrants expulsion

- In determining the appropriate penalty in any case before it, the discipline committee must balance the principles of specific deterrence, general deterrence and rehabilitation. This does not mean that it must give equal weight to these principles. It was clear from the discipline committee's reasons in this case that weight had been given to all three principles in determining appropriate sanction. The levy of a fine in an amount greater than that recommended by the professional conduct committee, and the orders of suspension and publication, all speak to deterrence, while the requirements for continued monitoring, and production of evidence of abstention from cocaine, speak to rehabilitation and deterrence, as well as to protection of the public.

The issue before the appeal committee was whether or not the discipline committee, upon consideration of all the evidence before it, properly exercised its discretion and imposed a sanction within an appropriate range of sanctions given the facts of this particular case. Unless there was an error in principle made, or unless the sanction imposed clearly did not fit the crime, the appeal committee determined that it should not disturb the penalty and substitute its judgment for that of the discipline committee.

Upon deliberation, the appeal committee concluded that the discipline committee had properly considered and applied the principles of sentencing, and had imposed a sanction within the range of sanctions suitable to the misconduct. Accordingly, the appeal committee dismissed the professional conduct committee's appeal, and confirmed the order of the discipline committee in all respects except as to the commencement date of the suspension. Accepting the argument of "fairness" made on behalf of Mr. Gary, and the evidence of his lengthy voluntary suspension, the appeal committee allowed the cross-appeal to the extent of varying the commencement date of Mr. Gary's suspension to December 13, 1999, being the date upon which the discipline committee's decision and order would have become final, and the suspension would have commenced, had the professional conduct committee not appealed.

DATED AT TORONTO, THIS *10TH* DAY OF MAY, 2000
BY ORDER OF THE APPEAL COMMITTEE



R.E. PARISI, CA – CHAIR
THE APPEAL COMMITTEE

MEMBERS OF THE PANEL

R.J.L. BOWMAN, CA
E.W. CONLIN, CA
D.J. HERLICK, CA
J.J. LONG, CA
E.W. SLAVENS, FCA
B.W. BOWDEN (Public representative)