JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2004-01-27-28 / NOT PRECEDENTIAL**
ID: **JM030011-H**
DATE: **01-27-04**
DISPOSITION: **DISBARMENT OF CRYSTAL HIERSCHE**
TAX TYPE: **PRACTICE AND PROCEDURE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On June 11, 2003, the Office of General Counsel filed a Petition for Disbarment against Crystal Hiersche ("Respondent"), alleging violations of the provisions of 68 O.S. § 236 and Oklahoma Administrative Code ("OAC") 710:1-5-200, and seeking to disqualify the Respondent from further practice before the Oklahoma Tax Commission, and that Respondent be prohibited from the preparation or filing on behalf of or as an agent for any other person any tax return, report or application required or provided for under the tax laws or motor vehicle registration laws of the State of Oklahoma.

2. Respondent was employed by XYZ REGISTRATION ("XYZ REGISTRATION") from February 2001 until April 2003.[1]

3. While employed by XYZ REGISTRATION, Respondent's supervisors were MR. A, MS. B, MR. C, and MRS. C. On a day-to-day basis Respondent's supervisors were MR. A and MS. B.[2]

4. XYZ REGISTRATION acted as the registration agent for REGISTRANT AAA, for the 1999 and 2000 registration years.[3]

5. REGISTRANT AAA registered as a motor carrier for the 1999 and 2000 registration years.[4]

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[1] Tr. at 36-37.

[2] Tr. at 37-38.

[3] The Office of General Counsel introduced these exhibits as background to show the history of the two accounts leading up to the 2003 applications which are the subject of this proceeding and to show what information was available to Respondent when preparing the 2003 applications. There has been no allegation(s) of wrongdoing by Respondent in relation to the 1999 and 2000 applications. See Exhibits 1 and 2, and Tr. at 8-12. The authorized representatives of XYZ REGISTRATION, as Attorney-In-Fact did not include Respondent.

[4] See Note 3.

6. XYZ REGISTRATION acted as the registration agent for REGISTRANT AAA for the 2001 and 2002 registration years.[5]

7. REGISTRANT AAA registered as an owner operator for the 2001 and 2002 registration years.[6]

8. REGISTRANT AAA's application for 2002 included a Limited Power of Attorney dated October 9, 2002 from AAA to XYZ REGISTRATION which lists Respondent as an authorized representative of Attorney-in Fact, XYZ REGISTRATION.[7]

9. XYZ REGISTRATION acted as the registration agent for REGISTRANT BBB, for the 2001 registration year.[8]

10. REGISTRANT BBB registered as a motor carrier for the 2001 registration year. BBB's application for 2001 included a Limited Power of Attorney from REGISTRANT BBB to XYZ REGISTRATION dated March 28, 2001 which lists Respondent as an authorized representative of Attorney-in-Fact, XYZ REGISTRATION.[9]

11. XYZ REGISTRATION acted as registration agent for REGISTRANT BBB for the 2002 registration year.[10]

12. REGISTRANT BBB registered as a motor carrier for the 2002 registration year. Respondent was listed on the Power of Attorney submitted with 2002 IRP Application of BBB and Respondent also signed the Real Estate Lease attached to the 2002 IRP Application on behalf of BBB.[11]

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[5] The Office of General Counsel introduced these exhibits as background to show the history of the two accounts leading up to the 2003 applications which are the subject of this proceeding and to show what information was available to Respondent when preparing the 2003 applications. There has been no allegations(s) of wrongdoing by Respondent in relation to the 2001 and 2002 applications. See Exhibits 3 and 4, and Tr. at 13-15. The authorized representatives of XYZ REGISTRATION, as Attorney-In-Fact include Respondent.

[6] See Note 5.

[7] See Note 5.

[8] See Note 3. See Exhibit 5.

[9] See Note 8.

[10] See Note 3. See Exhibit 6.

[11] See Note 10.

13. On or about October 30, 2002, Respondent, as its agent, prepared and signed the 2003 IRP Application on behalf of REGISTRANT AAA as an owner-operator. The 2003 application was received by the Prorate Section, Motor Vehicle Division, Oklahoma Tax Commission on October 30, 2002.[12]

14. In support of the 2003 IRP Application of REGISTRANT BBB, Respondent submitted an Equipment Lease listing REGISTRANT AAA as "Lessor" and REGISTRANT BBB and "Lessee".[13]

15. On or about November 13, 2002, Respondent, as its agent, prepared and signed the 2003 IRP Application on behalf of REGISTRANT BBB as an owner-operator. The 2003 application was received by the Prorate Section on November 13, 2002.[14]

16. In support of the 2003 IRP Application of AAA, Respondent submitted an Equipment Lease listing REGISTRANT BBB as "Lessor" and AAA as "Lessee".[15]

17. Respondent understood the difference between an owner-operator and motor carrier and the documentation required to file applications for both types of applicants. Respondent examined XYZ REGISTRATION's files for REGISTRANTS AAA and BBB for the prior year's registration.[16]

18. Respondent knew when she filed the 2003 applications of REGISTRANTS AAA and BBB as owner-operators that the applications were false.[17]

19. Each IRP application[18] prepared and signed by the Respondent and submitted to the Oklahoma Tax Commission contains the following statement above the signature line:

> "The undersigned, under oath, swears under penalty of perjury that the information furnished in this application and supporting documents is true and correct, and also that he/she will comply with the mandatory records retention as outlined on the back of this schedule." ("Emphasis Added")

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[12] See Exhibit 7.

[13] See Note 12.

[14] See Exhibit 8.

[15] See Note 14.

[16] Tr. at 38-41.

[17] See Note 16.

[18] See Exhibits 7 and 8.

20. THE SUPERVISOR, Prorate Section, Motor Vehicle Division, Oklahoma Tax Commission became familiar with both applications when one of his employees was reviewing the renewal applications and both applications happened to come across the employee's desk at the same time and he noticed that there was a commonality with the two. REGISTRANTS AAA and BBB were using each other as their motor carrier to qualify as owner-operators[19]

21. On or about December 2, 2002, THE SUPERVISOR, Prorate Section, Motor Vehicle Division, Oklahoma Tax Commission, sent REGISTRANT AAA and Respondent a letter advising that AAA's application was denied.[20]

22. On or about December 2, 2002, THE SUPERVISOR, Prorate Section, Motor Vehicle Division, Oklahoma Tax Commission, sent REGISTRANT BBB and Respondent a letter advising that BBB's application was denied.[21]

23. Respondent has been self-employed since May 2003 to present, as owner and President, ZZZ COMPANY, filling out applications for title for out-of-state lien holders for submission to the Oklahoma Tax Commission.[22]

ISSUES

Whether the Office of General Counsel has established by a preponderance of the evidence, that a violation of 68 O.S. § 236 has occurred such that Respondent should be disqualified from practice before the Oklahoma Tax Commission?

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[19] Tr. at 8.

[20] See Exhibit 7 and Tr. at 7 and 20-22.

[21] See Exhibit 8 and Note 19.

[22] Tr. at 34.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this Disqualification procedure pursuant to the provisions of 68 O.S. § 236[23] and has promulgated OAC 710:1-5-200[24] in accordance with 68 O.S. § 236.

2. The Oklahoma Tax Commission may disbar from further practice before the Tax Commission any such person shown to be incompetent or disreputable or who refuses to comply with the Oklahoma Tax Commission's rules and regulations, or who shall prepare a false or fraudulent report or return.[25]

3. The Office of the General Counsel shall have the burden of establishing, by a preponderance of the evidence[26], that a violation of Section 236 has occurred such that respondent should be disqualified from practice before the Commission.[27]

4. The State of Oklahoma entered into and is a member of the International Registration Plan ("IRP") which provides for the registration and licensing of vehicles engaged in interstate commerce or combined interstate and intrastate commerce on a proportional basis commensurate with the use of Oklahoma highways.[28]

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[23] The terms of 68 O.S. § 236 provide:

The Tax Commission may prescribe rules and regulations governing the recognition of agents, accountants, attorneys, or other persons representing taxpayers before the Tax Commission, and may require that such person, before being recognized as representatives of taxpayers, shall make a proper showing that they are of good character and in good repute and are possessed of the necessary qualifications to enable them to render such taxpayers valuable services, and are otherwise competent to advise and assist such taxpayers in the preparation of reports, returns or cases to be filed with or heard before the Tax Commission. The Tax Commission may, after due notice and an opportunity for hearing, suspend and disbar from further practice before the Tax Commission any such person, agent, accountant or attorney shown to be incompetent or disreputable, or who refuses to comply with said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any taxpayer or prospective client by words, circular, letter, or by advertisement, or who shall advise a taxpayer to file a fraudulent or false report or return, or who shall prepare a false or fraudulent report or return in any particular whatsoever, or who shall assist, aid or abet any taxpayer in concealing any information pertaining to said taxpayer□s books, records, reports or returns, or who shall delay proceedings of the Tax Commission to assist a taxpayer in disposing of or concealing property upon which levy could be made for the collection of taxes accrued, or who shall be in default in payment of taxes or filing reports or returns under State tax law.

[24] OAC 710:1-5-200(a) provides in pertinent part:

Any person shown to be in violation of the provisions of Section 236 of Title 68 of the Oklahoma Statutes, may after notice and an opportunity for hearing, be disqualified from practice before the Oklahoma Tax Commission.

[25] See Note 23.

[26] OAC 710:1-5-77(b) provides in pertinent part that "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[27] OAC 710-1-5-200(f). The standard of review in an administrative proceeding is preponderance of the evidence. Oklahoma Tax Commission Order No. 99-04-08-003 (citing Oklahoma Tax Commission Order No. 91-10-17-061).

[28] 47 O.S. § 1120(A).

5. The Oklahoma Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement and collection of taxes under the IRP and the Oklahoma Motor Vehicle Licensing and Registration Act.[29]

6. That rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[30]

7. Before a vehicle can be proportionally registered in the State of Oklahoma, the registrant must either have an established place of business[31] located in the State of Oklahoma or satisfy the requirements for registration as an owner-operator.[32]

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[29] 47 O.S. § 1101 et seq.; which incorporate by reference Articles I through XXII of the IRP. OAC 710:60-4-20(b)(1).

[30] 75 O.S. § 250 et seq., § 301 et seq. 75 O.S. § 308.2(C).

[31] For the registration years 1999-2002, a motor carrier and owner-operator could use the address and phone number of its registration agent to satisfy the requirements for "established place of business" by entering into a lease with the registration agent and an employee of the registration agent conducting the registrant's "business".

OAC 710-60-4-5. Established place of business requirements. Added at 12 Ok Reg 597, eff 12-5-94 (emergency); added at 12 Ok Reg 2931, eff 7-14-95 provided:

> To verify a registrant's established place of business in Oklahoma, registrant must provide proof of:
> (1) A physical structure, owned, leased or rented by registrant, wherein operational records of the fleet can be made available for audit purposes;
> (2) A telephone or telephones, located in the structure, which is publicly listed in the name of the fleet registrant, as evidenced by one of the following:
> (A) Phone bill in registrant's name; or
> (B) A copy of current listing in current phone book; and
> (3) A person or persons conducting the registrant's business.

[32] OAC 710-60-4-6. Owner-operator vehicles. Added at 12 Ok Reg 597, eff 12-5-94 (emergency); re-added at 12 Ok Reg 2931, eff 7-14-05, provided:

> Proportional registration for owner-operators may be accomplished by one of the following procedures:
> (1) When applicant is the owner-operator. The owner-operator (lessor) may be the registrant and the vehicle may be registered in the name of the owner-operator. The application must be completed in accordance with the operational records of the owner-operator. In addition to the completed application, the owner-operator must submit a current telephone listing, Oklahoma street address, and an Affidavit for Mandatory IRP Records. In addition to the completed application, the owner-operator must submit an executed copy of the lease between the owner-operator and the carrier if using the carrier to satisfy operating authority or proof of insurance; or
> (2) When applicant is a lessee. The lessee may be the registrant at the option of the lessor and the vehicle may be registered by the carrier, but in both the owner-operator's name and that of the carrier as lessee. The application must be completed according to the operational records of the carrier. The plates and cab cards shall be the property of the lessee. The carrier must have met the requirements of an established place of business in Oklahoma as set out in 710-60-4-5. In addition to the completed application, the lessee or owner-operator must submit an executed copy of the lease between the owner-operator and the carrier if using the carrier to satisfy operating authority or proof of insurance.

8. In order for a motor carrier to show an established place of business located in Oklahoma, the registrant must provide proof of a physical structure designated by a street number or road location that is open during normal business hours, which contains within it: (1) a telephone publicly listed in the name of the fleet registrant; (2) a person conducting the fleet registrant's business; and, (3) the operational records of the fleet, unless such records can be made available in accordance with the provisions of Section 1602 of the IRP. A registrant cannot use a registration agent or other third party's business to satisfy the requirement of a physical structure, telephone number or the presence of a person conducting the registrant's business.[33]

9. The requirements for an owner-operator are less stringent. "Owner-Operator" means an equipment lessor who leases his vehicular equipment with driver to a carrier.[34] An owner-operator's application must be completed in accordance with the operational records of the owner-operator. A current telephone listing, Oklahoma street address, and an Affidavit for Mandatory IRP Records must also be submitted. If using a carrier to satisfy the requirement of operating authority or proof of insurance, the owner-operator must also submit an executed copy of the lease between the owner-operator and the carrier.

10. For the 2003 registration year, REGISTRANTS AAA and BBB would not qualify to register in Oklahoma as motor carriers without satisfying the requirements of OAC 710:60-4-5.

11. The Office of General Counsel has established by a preponderance of the evidence, that a violation of 68 O.S. § 236 has occurred such that Respondent should be disqualified from practice before the Oklahoma Tax Commission.

The Respondent by her own testimony admitted that she prepared the IRP applications for the registration year 2003 for REGISTRANTS AAA and BBB knowing that the information contained therein was false. Respondent also knew the prior filing history for both, having examined XYZ REGISTRATION's files and by her testimony demonstrated her knowledge of the rules and regulations of the Oklahoma Tax Commission for prior years, as well as the 2003 registration year.

It is the Respondent's position that she was employed as office personnel to assist the owners of XYZ REGISTRATION in the service to its various customers in submitting applications for and obtaining titles, cab cards and making required reports to the IRP through the Motor Vehicle Division of the Oklahoma Tax Commission and that she never presented any documents directly to the Oklahoma Tax Commission while employed by XYZ REGISTRATION, but only gave documents to the various owners and managers of XYZ REGISTRATION for submission to the Oklahoma Tax Commission.

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[33] OAC 710:60-4-5. Amended at 19 Ok Reg 752, eff 1-29-02 (emergency); Amended at 19 Ok Reg 1216, eff 5-11-02; Amended at 20 Ok Reg 2950, eff 10-1-03.

[34] OAC 710:60-4-6. Amended at 20 Ok Reg 753, eff 3-7-03 (emergency); Amended at 820 Ok Reg 2587, eff 7-11-03.

Respondent also testified that she advised each of the representatives of REGISTRANTS AAA and BBB of the rule change to OAC 710:60-4-5 and informed them that they could not file as motor carriers, but that both companies instructed her to submit documentation to the Oklahoma Tax Commission that would show that each of the companies leased onto the other company as an owner-operator. Respondent also testified that she informed the representatives of both companies that the applications would not comply with the new provisions of OAC 710-60-4-5 and that she contacted her immediate supervisor, MR. A, who instructed her to prepare the applications as requested by the companies so that they could receive a letter from the Oklahoma Tax Commission denying the applications for failure to comply with OAC 710:60-4-5, in spite of the fact that each application prepared and signed by Respondent was under oath and sworn under penalty of perjury that the information furnished in the application and supporting documents was true and correct.

Respondent argues that she is not in violation of 68 O.S. § 236 and concludes that she is not a disreputable person or incompetent because the applications for AAA and BBB were not accepted by the Oklahoma Tax Commission and did not become a permanent record of the Oklahoma Tax Commission. Respondent's position is not persuasive.

The Supervisor of the Prorate Section testified that all applications are imaged as they are processed and kept in the normal course of business by the Oklahoma Tax Commission. The 2003 applications of REGISTRANTS AAA and BBB were brought to his attention by an employee who was reviewing the previous year's application, and both of the accounts happened to come across the employee's desk at the same time. The fact that the applications were denied by the Oklahoma Tax Commission does not lessen the impact of Respondent's conduct under 68 O.S. § 236, and the defense of "I was only doing what I was told by my supervisor" does little to mitigate her conduct and responsibility for her actions.

DISPOSITION

It is the DETERMINATION of the undersigned, based upon the specific facts and circumstances of this case, that the Petition For Disbarment filed by the Office of General Counsel be sustained and that the Respondent be disqualified from practice before the Oklahoma Tax Commission indefinitely. It is further DETERMINED as a result of her disqualification from practice that the Oklahoma Tax Commission no longer accept filings from ZZZ COMPANY, of which Respondent is owner and President.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.