

**STATE OF FLORIDA
BOARD OF ACCOUNTANCY**

**IN RE: REQUEST FOR HEARING IN OBJECTION TO NOTICE OF INTENT TO DENY
PETITION FOR VARIANCE by**

MICHAEL SACK ELMALEH

VW 2022-014

FINAL ORDER

THIS CAUSE came before the **BOARD OF ACCOUNTANCY** (Board) pursuant to Sections 120.569 and 120.57(2), Florida Statutes, on September 23, 2022, in Orlando, Florida, in consideration of the request of **Michael Elmaleh** (Petitioner) for a hearing regarding the Notice of Intent to Deny his Petition for Variance or Waiver (Petition) of **Rules 61H1-31.006, and 61H1-33.006(1), (2), F.A.C.** Neither Petitioner nor legal counsel was present for the proceeding. The Board was represented by Rachelle Munson, Senior Assistant Attorney General. The Notice of Intent to Deny, filed April 12, 2022, and Petition, filed February 9, 2, are attached and incorporated by reference as composite Exhibit A.

STATEMENT OF RELEVANT FACTS

The facts relevant to the petition are as follows:

1. Rule 61H1-31.004, F.A.C., provides:

A delinquent status licensee shall pay a delinquency fee of \$25.00 when licensee applies for active or inactive status.

Rule 61H1-31.006, F.A.C., provides:

The application fee for reactivation of an inactive status license to active status shall be \$250.00; for reactivation of a delinquent status license to active, \$250.00. In all cases completion of the requirements of Rule 61H1-33.006, F.A.C., shall be required for reactivation. (emphasis added)

Rule 61H1-33.006(1), (2), F.A.C., in relevant part, provides:

(1) Each Florida certified public accountant who has requested inactive status or became delinquent, as distinguished from a Florida certified public accountant whose certificate or license has been suspended, who desires to

become an active Florida certified public accountant, ... shall apply for such reactivation by completing and submitting to the Department Form DBPR CPA 7 – CPA Change of Status Application, ... However, if a license is delinquent on January 1 for failure to comply with Rule 61H1-33.003, F.A.C., through failure to report compliance with continuing professional education requirements by ... December 31st, a Florida certified public accountant may reactivate, pursuant to Section 473.311, F.S., by certifying the required hours have been completed, paying the fees required by Rules 61H1-31.003, 31.004 and 31.006, F.A.C., by March 15 of the same year of the delinquency. (emphasis added)

(2) Each such application shall demonstrate successful completion of the required number of continuing professional education hours as follows:

Accounting/Auditing – At least 30 hours
Ethics – At least 8 hours
Behavioral – No more than 30 hours
Total Hours – 120 hours.

2. There is no dispute of fact regarding the renewal date for the license, of December 31, 2021, and the date the Petitioner renewed the license, January 12, 2022.

3. The Division of Certified Public Accounting maintains that Petitioner's license was delinquent at the time Petitioner renewed the license.

4. Petitioner, represented by counsel, asserts in his request for hearing, the existence of a disputed issue of material fact regarding the status of the Petitioner's license. Specifically, whether the license was "inactive" or "delinquent."

5. Petitioner further maintains, "at worst it was delinquent."

6. Licensure status is outlined in Chapter 61H1-30, F.A.C. of the rules governing the profession. In that chapter, the rules provide that a delinquent license shall be subject to the requirements of Rule 61H1-33.006, F.A.C.

7. Petitioner did not present any facts to show the license was "inactive," a status which requires an affirmative act of the licensee to place the license in an inactive status.

8. On May 20, 2022, Petitioner's Request for Hearing was properly noticed for review as a *Request for Hearing pursuant to 120.57(1), F.S. and, if not applicable, Request for Informal Hearing pursuant to 120.57(2), F.S.*

9. Petitioner did not appear or present any evidence of a disputed issue of material fact pursuant to the requirement of Section 120.57(1), F.S., to support the assertion in the request for hearing.

10. No disputed issues of material fact exist.

11. The Board proceeded to review the matter pursuant to Section 120.57(2), F.S.

12. Petitioner did not appear to present any new evidence in support of his request for a permanent one-time waiver of the requirements of Rules 31.006, and 33.006(1), (2), F.A.C., to the extent necessary for the Board to allow renewal without the requisite penalty.

CONCLUSIONS OF LAW

13. Based on the requirements of Rules 31.006, and 33.006(1), (2), F.A.C., the Board upheld the Notice of Intent Deny on the following grounds:


- a. Petitioner failed to establish that the purpose of the underlying statute, Sections 473.305, 473.313, F.S., would be met were he to be granted a variance from Rules 61H1-31.004, 31.006, and 33.006, F.A.C.
- b. Petitioner further failed to establish that the Board's application of Rules 61H1-31.004, 31.006, 33.006(1), (2), F.A.C., given the basis for his delinquency, would violate principles of fairness and impose a substantial hardship on him.

Based on the foregoing findings of fact and conclusions of law, it is therefore **ORDERED** that the Notice of Intent to Deny the Petition is upheld.

This Final Order shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 24 day of October, 2022, by the
Florida Board of Accountancy.

FLORIDA BOARD OF ACCOUNTANCY



Roger Scarborough, Division Director ✓
Division of Certified Public Accounting

NOTICE OF RIGHTS

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to **Section 120.68, Florida Statutes**. Review Proceedings are governed by Rules 9.110 and 9.190, Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Department of Business and Professional Regulation, Attn: Ronda L. Bryan, Agency Clerk, 2601 Blair Stone Road, Tallahassee, Florida 32399, and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Florida Appellate District where Respondent resides. The Notice of Appeal must be filed **within thirty (30) days** of the filing of the Order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to **Michael Sack Elmaleh c/o Jill Berman, Esq.**, 521 Savona Avenue, Coral Gables, FL 33146 and jillnberman@gmail.com; by electronic delivery to Roger Scarborough, Executive Director, at Roger.Scarborough@myfloridalicense.com; and to Rachelle Munson, Senior Assistant Attorney General, at Rachelle.Munson@myfloridalegal.com this 1st day of November, 2022.



**STATE OF FLORIDA
BOARD OF ACCOUNTANCY**

**IN RE: PETITION FOR VARIANCE OR WAIVER BY
MICHAEL SACK ELMALEH**

NOTICE OF INTENT TO DENY PETITION

VW 2022-014

Petitioner, Michael Sack Elmaleh, filed a petition for a permanent variance from the requirements of **Rules 61H1-31.006, and 61H1-33.006(1), (2), Florida Administrative Code (F.A.C.)** on February 9, 2022. The notice of the petition appeared in the Florida Administrative Register on March 2, 2022, in Volume 48 Number 42. No comments by interested persons were received. The petition was heard at a duly-noticed public meeting of the Board of Accountancy on March 18, 2022, in Orlando, Florida. Petitioner was neither present nor represented by counsel for the proceeding. The Board was represented by Rachelle Munson, Assistant Attorney General. The petition is attached hereto and incorporated by reference.

STATEMENT OF RELEVANT FACTS

The facts relevant to the petition are as follows:

1. Rule 61H1-31.004, F.A.C., provides:

A delinquent status licensee shall pay a delinquency fee of \$25.00 when licensee applies for active or inactive status.

Rule 61H1-31.006, F.A.C., provides:

The application fee for reactivation of an inactive status license to active status shall be \$250.00; for reactivation of a delinquent status license to active, \$250.00. In all cases completion of the requirements of Rule 61H1-33.006, F.A.C., shall be required for reactivation.

Rule 61H1-33.006(1), (2), F.A.C., in relevant part, provides:

(1) Each Florida certified public accountant who has requested inactive status or became delinquent, as distinguished from a Florida certified public accountant whose certificate or license has been suspended, who desires to become an active Florida certified public accountant, ... shall apply for such reactivation by completing and submitting to the Department Form DBPR CPA 7 – CPA Change of Status Application, ... However, if a license is

delinquent on January 1 for failure to comply with Rule 61H1-33.003, F.A.C., through failure to report compliance with continuing professional education requirements by ... December 31st, a Florida certified public accountant may reactivate, pursuant to Section 473.311, F.S., by certifying the required hours have been completed, paying the fees required by Rules 61H1-31.003, 31.004 and 31.006, F.A.C., by March 15 of the same year of the delinquency.

(2) Each such application shall demonstrate successful completion of the required number of continuing professional education hours as follows:
Accounting/Auditing – At least 30 hours
Ethics – At least 8 hours
Behavioral – No more than 30 hours
Total Hours – 120 hours.

2. Petitioner asserts he maintains a license in Florida, Wisconsin, and Maryland, and the date for renewal in Wisconsin was January 31, 2022.

3. The renewal date for Petitioner's Florida license was December 31, 2021.

4. Petitioner renewed his Florida license on January 12, 2022.

5. Petitioner asserts in the petition that he confused the renewal date for the Florida license with the renewal date for the Wisconsin license.

6. Petitioner asserts that under Sections 473.312 and 473.313(1), (2), F.S., as they relate to his situation, support his claim that his license was active when he paid the renewal fee 12 days after the renewal fee was due.

7. Petitioner requests the removal of the \$250.00 reactivation fee from his account, reflecting a permanent one-time waiver of Rule 61H1-31.006, F.A.C., to the extent necessary for the Board to allow renewal without the requisite penalty.

GROUND FOR DENIAL

The Board determined that, based on the requirements of Rules 61H1-31.004, 31.006, and 33.006(1), (2), F.A.C., the petition should be denied on the following grounds:

8. Petitioner failed to establish that the purpose of the underlying statute, Section 473.305, F.S., with consideration given to Sections 473.311, 473.312, and 473.313, F.S., would be met were he to be granted a variance from Rules 61H1-31.006, F.A.C.

9. Petitioner further failed to establish that the Board's application of Rule 61H1-31.006, F.A.C., given the basis for his delinquency and in acknowledgment of his personal oversight, would violate principles of fairness and impose a substantial hardship on him.

It is therefore **ORDERED** that the petition be **DENIED**.

This Notice shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 1st day of April, 2022, by
the Florida Board of Accountancy.

FLORIDA BOARD OF ACCOUNTANCY


Roger Scarborough, Division Director
Division of Certified Public Accounting

NOTICE OF RIGHT TO HEARING

This notice constitutes final agency action if no request for a hearing is received by the Board on or before the twenty-first (21st) day after the applicant's receipt of the notice. The applicant may request a hearing by filing an appropriate petition with the Division Director of the Board at 240 Northwest 76th Drive, Suite A, Gainesville, FL 32607. The applicant or petitioner may petition for a hearing involving disputed issues of material fact before an administrative law judge pursuant to Section 120.57 (1), Florida Statutes, or for a hearing not involving disputed issues of material fact pursuant to Section 120.57 (2), Florida Statutes.

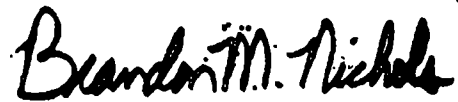
A petition for a hearing involving disputed issues of material fact must contain information required by Rule 28-106.201, Florida Administrative Code, ***including a statement of all disputed issues of material fact***. The Board may refer a petition to the Division of Administrative Hearings for assignment of an administrative law judge only if the petition is in substantial compliance with the

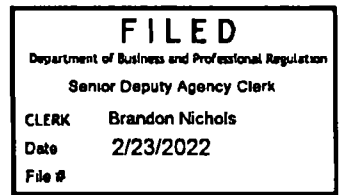
rule requirements. A petition for a proceeding not involving disputed issues of material fact must contain information required by Rule 28-106.301, Florida Administrative Code, including a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle petitioner to relief.

In accordance with Section 120.573, Florida Statutes, mediation is not available.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to **Michael Sack Elmaleh**, 521 Savona Avenue, Miami, FL 33146; and to Kenneth Plante, Chief Attorney, Joint Administrative Procedures Committee, 111 W. Madison Street, Pepper Building, Room 680, Tallahassee, Florida 32399-1400, and by electronic delivery to: Rachelle Munson, Assistant Attorney General, at Rachelle.Munson@myfloridalegal.com; Cassandra Fullove, Paralegal, at Cassandra.Fullove@myfloridalegal.com this 12th day of April, 2022.





Michael Sack Elmaleh
Certified Public Accountant
Certified Valuation Analyst
521 Savona Avenue, Miami, FL 33146
Phone: 240-409-1293 Email: mselmaleh@gmail.com

Rachelle Munson
Board Counsel
Board of Accountancy
Rachelle.munson@myfloridalegal.com

VW 2022-014

February 21, 2022

Subject: Request for Waiver from Michael Sack Elmaleh License Number AC51050

Dear Ms. Munson:

Thank you kindly for your letter of February 17, 2022, in which you indicate that I did not submit a complete petition seeking a waiver from a specific rule. This letter will supplement my letter of February 9, 2022. Please add it to the materials for consideration at the meeting on March 18.

Summary of Position

I attempted to renew my Florida CPA license, which was in active status, 12 days after renewal was required. I planned to pay \$105 plus the \$25 late fee set out in Section 473.305, Fla. Stat. Payment was rejected and when I contacted the Board office, I was told I owed a \$250 reactivation fee as well. I objected to this fee and therefore sought relief from the Board. My CPE is current and my license was in good standing.

I question the Board's authority to impose the \$250 fee except where a license has become inactive; mine was not. If the Board's position is that it can impose the \$250 reactivation fee because I was "delinquent" in my filing, and relies on Rule 61H1-33.006 to support the fee, this violates the limitations of Section 473.305, Fla. Stat.

Alternatively, I seek a waiver of Rule 61H1-33.006 on the following grounds:

1. I made a clerical error in tracking the due date of the license fee and corrected it within twelve days of discovering the error.
2. A twelve-day delay in meeting a relicensing deadline does not constitute an inactivation of my license under the statutory definitions and hence the imposition of a reactivation fee is not appropriate.

I understand the Board cannot waive a “statutory provision” but can consider a waiver of its own rule in certain circumstances. I am not seeking a waiver of a statute. In fact, the applicable statute seems to support my understanding that the Board cannot impose more than a \$50 fee except in the case of an inactive licensee seeking reactivation.

473.305 Fees. The board, by rule, may establish fees to be paid for applications, examination, reexamination, licensing and renewal, reinstatement, and record making and recordkeeping. ... The board may also establish, by rule, a reactivation fee, and a *delinquency fee not to exceed \$50* for continuing professional education reporting forms. ... [emphasis added]

(Note that there is no other definition of delinquency except this reference to CPE reporting forms. I am not and was not so delinquent.)

The Board’s own authorizing statute limits reactivation fees to \$250 and delinquency fees to \$50. My license was not “inactive.” A license only becomes inactive upon request of the CPA *or* for failure to comply with CPE requirements.

Here is the statute:

473.313 Inactive status: (1) A Florida certified public accountant may request that her or his license be placed in an inactive status by making application to the department. The board may prescribe by rule fees for placing a license on inactive status, renewal of inactive status, and reactivation of an inactive license.

(2) A license that has become inactive under subsection (1) or for failure to complete the requirements in s. 473.312 may be reactivated under s. 473.311 upon application to the department.

Therefore there is no basis for imposing a \$250 “reactivation fee” on me for being late in filing my renewal.

61H1-31.006 Reactivation Fee.

The application fee for reactivation of an inactive status license to active status shall be \$250.00; for reactivation of a delinquent status license to active, \$250.00. In all cases completion of the requirements of rule 61H1-33.006, F.A.C., shall be required for reactivation.

However, the authorizing *statute* does not permit a fee of \$250 for curing a delinquency, only a \$50 fee for failure to comply with CPE reporting.

I am not aware of the Board asking me to prepare a Change of Status Application and again this would not be correct in my case – my license is not and was not inactive, as I read the rules.

This leaves the Board with the argument, I assume, that I owe a fee for being “delinquent” in paying my renewal fee 12 days late. Assuming this mistake – and it was one – meets the unstated definition of delinquency, by statute the Board is limited to a \$50 fee. §473.305, Fla. Stat.

The Board rule sets a \$25 late fee – which of course complies with the \$50 statutory limitation. I am not seeking a waiver of the \$25 late fee and I have already tendered it to the Division with the full proper renewal fee.

Should the Board not agree with my argument that there is no basis for a reactivation fee, in the alternative, I request a waiver from enforcement of the fee in Rule 61H1-31.006, on the above cited grounds:

Sincerely,



Michael Sack Elmaleh
Certified Public Accountant
Certified Valuation Analyst

Cc: Kevin.brown@myfloridalicense.com