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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF
FINANCE, CONSUMER FINANCE BUREAU,

Complainant,

v.

WALL & ASSOCIATES, INC., A VIRGINIA
CORPORATION,

Respondent.

Docket No. 2019-9-10

**ORDER RE: MOTION FOR
RECONSIDERATION**

This matter having come before the Hearing Officer on the Motion of Respondent for reconsideration of the Hearing Officer's Decision and Order Regarding Restitution and Penalties, dated January 4, 2022, the following decision is entered.

The Respondent in this matter has presented several arguments for reconsideration. Initially, of note is that there is insufficient authority to support Respondent's assertion that the order should be reconsidered and reduced based upon an alleged failure to take into account past outcomes for companies engaged in similar activities. Prior awards, while instructive, are not a constraint or limit on the amounts which can be awarded in the subject action.

Further, is the fact that the earlier penalties were apparently the result of negotiated consent orders. The grounds and basis to enter into a negotiated conclusion and willingness to compromise potential expenses and exposure are different factors than those under current consideration. What transpired in those matters may inform, but does not limit the penalties here.

Next, as clearly indicated in the statutory language, the subject penalty of \$3,000.00 per violation is within the allowable amount for such penalties. This amount was considered and determined appropriate based upon the number of violations, the activities involved and the goals inherent in statutes of this type.

This sum is both an effective sanction and deterrent. The suggestion that the amount should instead constitute a small or *de minimus* penalty provides little incentive to promote licensing compliance and provide warning to others to not engage in unlicensed activities. The character and magnitude of the harm threatened by the continuation of unlicensed activity further supports this penalty.

Respondent next argues as to the restitution awards granted, that these awards are subject to a statute of limitations defense and cannot be imposed for the time period claimed by the Department. This argument though, is not persuasive as established by the previously cited decisions of *Beale v. State Dept of Labor*, 139 Idaho 356, 79 P.3d 715 (Idaho 2003) and *Yesco v. State, ex rel., Winder*, 25 P.3d 117, 135 Idaho 804 (2001).

Next, Respondent contends that the restitution awards are improper based upon *Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 337 P. 3d 655 (2014). This is an argument which is based on the proposition that the goal of deterrence is not attained by an order of restitution nor is it inherently fair to impose such an award against a party who asserts a reliance on the Department's failure to prosecute this matter earlier in time. This argument is in essence a claim of estoppel. Even though now argued as a "waiver" by the Department, Respondent is asserting that it should not be held accountable for acts which it claims to have undertaken in reliance on the lack of further action by the Department. As determined and previously ruled upon in the Decision concerning the earlier motions for Preliminary Order and for Summary Judgment this argument is

rejected. The Respondent proceeded with a course of activity which it knew to be, in the view of the Department, in violation of the licensing requirements. Respondent proceeded knowing the Department's position. The holding in *Williams* does not warrant modification of the penalty or award of restitution.

A further ground for reconsidering the award is argued by the claim that the award improperly imposes upon Respondent, the obligation to repay amounts without providing an offset for overhead expenses. As stated in the Order, Respondent has failed to provide an adequate record to establish what those amounts in fact are. Respondent now, following the previous submission of materials, argues that it should be allowed a further opportunity to present such evidence. A showing of why such materials were not or could not have submitted in connection with the original briefing or even with the materials submitted with the motion for reconsideration was not provided. At this juncture, again no evidence has been presented sufficient to establish what these argued offset expenses are, nor that in fact Respondent can establish what specific expenses are uniquely attributable to the subject client files. Absent such evidence the Order will not be modified.

Respondent further argues that the Order providing restitution is punitive in nature and improper. Respondent notes several clients' files and contends that these clients who are alleged to have received favorable results, are examples that an award returning fees to these clients and others would be an inequitable punishment upon Respondent. As should be apparent, however, the consideration of what return was provided to Respondent's clients was considered in the subject award granted.

The percentage offset, while not an exact calculation for each client, provided a global means in part to account for the derived client benefits. The offset providing for a reduction from the

potential return of the entirety of the fees, recognizes the argument of an inequity in an award which would provide the clients with both a benefit from services provided and a return of the fees charged. As indicated in the Order, given the inherent difficulty of ascertaining and calculating what the “benefit” should be held to mean or translate to economically, resulted in this determination. Of note, is that even if benefits were provided to a client, such benefits do not preclude a restitution award which grants the return of potentially all fees charged. The unreasonableness and unfairness asserted by Respondent is tempered by the very language of Idaho Code Section 26-2244 which provides an allowance for the return of “any consideration” as a result of a finding of a violation.

Extensive review of the materials presented was made in this action. What is clear from the client files was the Respondent on average imposed significant fees to clients and the attempt to restore status quo is served by the award provided. In the consideration and weighing of the amounts charged the Idaho customers, the return of a majority portion of these fees is determined to be the appropriate means. The surrender of monies obtained from the cited individuals is not punitive but instead restorative. The relief provided was within the allowable scope of the statute and discretion of the hearing officer.

The arguments presented by Respondent in the Motion for Reconsideration do not provide sufficient grounds to overturn the Order.

IT IS HEREBY FURTHER ORDERED:

1. That the Respondent’s Motion for Reconsideration is denied.
2. The Order Regarding Restitution and Penalties, dated January 4, 2022, is amended as to subpart 1(e) to state “an award of the actual cost of the Department's investigation and the actual costs of this administrative proceeding, pursuant to Idaho Code Section 26-2244(2) and/or Idaho Code Section 12-117”.

3. The Department shall as directed in the Order Regarding Restitution and Penalties, dated January 4, 2022, submit a proposed Order providing for an award consistent with the language of the Order dated January 4, 2022 and this Order on Reconsideration.

4. That this decision shall at present remain confidential and not open and available to the public.

DATED this 7th day of February, 2022.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

NOTIFICATION OF RIGHTS

This is an Interlocutory order of the Hearing Officer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

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