BEFORE THE UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

HARRY I. MOATZ	)	
	)	
Director, Office of Enrollment and Discipline,	)	
	)	
v.	)	Decision on Petition Under 37 C.F.R. § 10.156(c)
	)	
GEORGE E. KERSEY,	)	
	)	
Respondent	)	
	)	

MEMORANDUM AND DECISION UPON RECONSIDERATION

George E. Kersey, Respondent, requests reconsideration of the Final Decision entered on August 3, 2006. The Final Decision held that the Initial Decision by the Administrative Law Judge (ALJ) to exclude Respondent from practice before the United States Patent and Trademark Office (USPTO) was not in error.[1] For the reasons stated below, the Final Decision of August 3, 2006, is **AFFIRMED**.

I. BACKGROUND AND PROCEDURAL HISTORY

Prior to this case, Respondent was the subject of disciplinary proceeding 00-7. Respondent sought review in the District Court for the District of Columbia, and it upheld the ALJ's decision.[2] Subsequently, Respondent's request for appeal was denied,[3] and then was reinstated.[4]

[1] Though not cited by Respondent, reconsiderations are authorized by 37 C.F.R. § 10.156(c).

[2] Kersey v. Undersecretary of Commerce for Intellectual Property, et.al., 2005 WL 486144 (D.D.C. 2005).

[3] "ORDERED that the notice of appeal be, and the same hereby is, DISMISSED, for failure to prosecute in accordance with the rules." Kersey v. Under Secretary of Commerce for Intellectual Property, 128 Fed.Appx. 771, 2005 WL 1060314 (Fed. Cir. 2005).

His appeal was ultimately heard by the Court of Appeals for the Federal Circuit, and the action against Respondent was upheld.[5] Violation of the suspension of the first case (00-7) led in part to the case at hand (D2004-5).

The case at hand began on June 18, 2004, when the Director of the USPTO's Office of Enrollment and Discipline (OED Director), filed a two-count complaint against Respondent. Charge one (1) was for continuing to practice law while disbarred by the state of New Hampshire in violation of 37 C.F.R. § 10.23(c)(5), and charge two (2) was for failing to return client files and continuing to practice before the USPTO while under a suspension in violation of 37 C.F.R. §§ 10.23(b)(5) and 10.24.[6]

On March 9, 2006, the ALJ granted summary judgment to the OED Director on both counts. Respondent made a timely appeal, and on August 3, 2006, the appellate authority held the ALJ *did not err in granting summary judgment and denied Respondent's appeal.*[7] In that decision, the appellate authority excluded the Respondent from practice before the USPTO (effective 30 days after the order), and gave notice that a request for reconsideration must be filed within 20 days. The Certificate of Service for this order specifies transmission by first class mail and is dated August 3, 2006. The envelope is post-marked August 4, 2006.

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[4] "ORDERED that the order of dismissal and the mandate be, and the same hereby are, VACATED and RECALLED, and the notice of appeal is REINSTATED." Kersey v. Under Secretary of Commerce for Intellectual Property, 193 Fed.Appx. 965, 2006 WL 2572380 (Fed. Cir. 2006).

[5] "This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED." Kersey v. Under Secretary of Commerce for Intellectual Property, 2007 WL 1107740 (Fed. Cir. 2007).

[6] That suspension was as a result of the Respondent's previous disciplinary case (00-7).

[7] The appellate authority was the General Counsel of the USPTO acting under the authority delegated to him by the Director of the USPTO.

Respondent mailed this request for reconsideration on August 19, 2006, and it was received on August 24, 2006.[8]

After the request for reconsideration, Respondent also sought review in the U.S. District Court for the District of Columbia by filing a *pro se* application with that court on September 5, 2006.[9]

II. OPINION

Respondent submits three grounds for reconsideration. First, he contends the Certificate of Service falsely specifies service on August 3, 2006, while the postmark shows it was mailed on August 4, 2006. Second, he contends the General Counsel had a clear conflict of interest because the attorneys representing the Complainant (the OED Director) work for the General Counsel, and therefore the General Counsel should not have made the determination. Finally, Respondent contends summary judgment was improper because there were disputed facts in the case.

a. Certificate of Service

Respondent asks that his case be remanded or dismissed based in part on the assertion the Commissioner's final decision under 37 C.F.R. § 10.156 falsely states it was sent by first class mail on August 3, 2006, when in fact it is postmarked August 4, 2006, and was mailed on that date.

Respondent's assertion might be a basis for considering an otherwise untimely request for reconsideration as timely. However, Respondent's request for reconsideration was granted as

[8] OED related documents must be received with original signature (37 C.F.R. § 1.4(e)), and because it was not sent by Express Mail, the appeal was filed when received by the office (37 C.F.R. § 1.8(a)(2)(iii)(A)).

[9] Civil Docket Case #1:06-MC-00416-EGS.

timely.[10] Respondent's assertion is not a basis for remanding or dismissing the underlying case against him.

b. Conflict of Interest

Respondent further asserts his case should be remanded or dismissed based in part on the assertion the General Counsel should not have made the determination (the Final Decision of the Commissioner under 37 C.F.R. § 10.156) because the attorneys representing the Complainant (the OED Director) work for the General Counsel.

To establish a conflict of interest, Respondent must show by clear and convincing evidence that the rulemaker involved "has an unalterably closed mind on matters critical to the disposition of the proceeding."[11] This reconsideration request must be decided based upon the record made before the administrative judge.[12] The Respondent did not present evidence of a conflict of interest to the administrative judge.[13] By making an assertion with no supporting evidence, Respondent has not demonstrated an actionable conflict of interest by clear and convincing evidence.

Respondent raised this very argument in the judicial review of his first disciplinary case. There, like here, Respondent asserted a conflict of interest was shown by the fact the subordinate

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[10] Under 37 C.F.R. § 10.156(c), Respondent has 20 days from the date of entry of the decision to file appeal. In this case, the final decision was dated August 3, 2006, and mailed on August 4, 2006. Respondent's appeal was received on August 24, 2006 (within the 20 day period), and is considered timely. It is worth mentioning that while the certification date and postmark date are different, that does not prove the statement was knowingly false. The certificate of service could be believed to be accurate if the decision was taken to the mail-room on August 3, 2006, but it was past the 2 p.m. drop off time and the package was postmarked the next day.

[11] C & W Fish Co., Inc. v. Fox, 745 F.Supp. 6 (D.D.C. 1990).

[12] 37 C.F.R. § 10.155(b).

[13] Proceeding D2004-05, Spencer T. Nissen, Administrative Law Judge, March 9, 2006.

attorney worked for the General Counsel. The Court held Respondent's assertion failed to provide any showing of a conflict of interest, let alone a clear and convincing one.[14]

Finally, it is worth noting that USPTO rules insulate the deliberations of the General Counsel from the OED Director.[15] The General Counsel makes determinations on appeal of final decisions without consultation with the OED Director.[16]

c. Summary Judgment

Finally, Respondent contends summary judgment was improper because there were disputed facts in the case. Respondent disputes three facts: 1) he was falsely disbarred by the state of New Hampshire, 2) the final decision of the General Counsel incorrectly assumes his case before the Court of Appeals for the Federal Circuit is not still pending, and 3) the November 14, 2001, decision is final because it was not appealed by either party.

The standard for summary judgment to be applied to each of these assertions of disputed fact is found in Federal Rule of Civil Procedure 56(c), which provides, "Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits or declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Material facts are those that "might affect the outcome of the suit under the governing law."[17]

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[14] Kersey v. Undersecretary of Commerce for Intellectual Property, et.al., 2005 WL 486144 (D.D.C. 2005). Upheld on appeal at Kersey v. Under Secretary of Commerce for Intellectual Property, 2007 WL 1107740 (Fed. Cir. 2007).

[15] 37 C.F.R. § 10.140(b). "The Commissioner shall designate at least two associate solicitors in the Office of the Solicitor to act as representatives for the Director in disciplinary proceedings. In prosecuting disciplinary proceedings, the designated associate solicitors shall not involve the Solicitor or the Deputy Solicitor. The Solicitor and the Deputy Solicitor shall remain insulated from the investigation and prosecution of all disciplinary proceedings in order that they shall be available as counsel to the Commissioner in deciding disciplinary proceedings."

[16] Id.

[17] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

1. "False" Disbarment by New Hampshire

Respondent asks that his case be remanded or dismissed based in part on the assertion he was "falsely" disbarred by the state of New Hampshire. The disbarment by the state of New Hampshire led to Respondent's suspension from practice in his first disciplinary case. Respondent's practice of law while under the suspension of Respondent's first disciplinary case led in part to the case at hand.

There are two reasons this argument is without merit. First, the law is clear that "a reciprocal disciplinary proceeding does not afford an attorney the opportunity to re-litigate misconduct allegations that have been heard and decided in another jurisdiction or to litigate the validity of the disciplinary proceeding in that jurisdiction."[18] If Respondent seeks to challenge the validity of the New Hampshire proceedings, he must make that challenge with the state of New Hampshire.

Second, a reconsideration request must be decided based upon the record made before the ALJ.[19] In this case, the record is clear the Respondent did not present any evidence on this issue.[20] The ALJ directed the Respondent to provide a copy of each document and exhibit to be proffered at the hearing, and a list of witnesses along with a brief summary of expected testimony. Respondent did not provide this evidence; rather, Respondent simply argued on his own behalf.[21] Because Respondent did not present evidence on this issue to the ALJ, there was no genuine issue of material fact, and summary judgment was proper.

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[18] In re Selmer, 595 N.W. 2d 373, 379 (Wis. 1999).

[19] 37 C.F.R. § 10.155(b).

[20] Proceeding D2004-05, Spencer T. Nissen, Administrative Law Judge, March 9, 2006.

[21] Id. at pages 6-7.

2. Incorrect Assumption in the Final Decision by the General Counsel

Respondent's next assertion is that his case should be remanded or dismissed because the final decision of the General Counsel incorrectly assumes his case before the Court of Appeals for the Federal Circuit is not still pending.

Contrary to Respondent's argument, the Final Decision dated August 3, 2006, does not assume Respondent had no case pending before the Court of Appeals of the Federal Circuit.[22] The opinion states that the USPTO may stay a final decision pending judicial review, but is not required to do so, in accordance with 37 C.F.R. § 10.157(c). The opinion goes on to conclude the Respondent did not obtain a stay and was therefore required to comply with the terms of the October 24, 2002, decision.

Respondent's assertion is factually wrong. The General Counsel did not assume there was no case pending. Rather, the General Counsel correctly concluded a stay had not been granted. The Respondent has presented no evidence otherwise, and there is no evidence in the record that Respondent was granted a stay. Absent any evidence to support his assertion, summary judgment against the Respondent was proper because there is no genuine issue as to a material fact.

3. Impact of November 14, 2001 Decision

Respondent's next assertion is that his case should be remanded or dismissed because "the final decision is that of November 14, 2001 since, as pointed out by Judge Nissen in his communication of February 6, 2002, copy attached as Exhibit C, neither party filed an appeal within 30 days of the ALJ Decision, and that decision became final."

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[22] See administrative record at Tab 27, page 4.

The November 14, 2001, decision Respondent is referring to is the Initial Decision in an earlier case against Respondent.[23] The ALJ making that Initial Decision found Respondent violated the USPTO's ethical rules and sanctioned him with a reprimand. The OED Director then appealed that decision, and on consideration of that appeal, the sanction was changed to a suspension. It was violation of the suspension in the earlier case that led to one of the charges in the case at hand. Though not explicitly stated, Respondent's point is that the original reprimand is valid and the suspension is not, and therefore he did not violate the suspension as charged in this case.[24]

Respondent cites two cases in support of his assertion that the November 14, 2001, decision is final.[25] These cases involve filings made after the period for appeal, and that is not the case here. The Initial Decision was made on November 14, 2001, and in accordance with 37 C.F.R. § 10.155, the appeal was due within 30 days (December 14, 2001). On December 11, 2001, the OED Director filed for an extension. An extension was granted until December 21, 2001, and the OED Director filed his appeal on that date.[26] Unlike the cases cited by Respondent where the moving party filed for appeal after the time for appeal had ended, the USPTO properly requested, and was granted, an extension, and then filed an appeal within the extension period.

Respondent pursued this line of argument in the District Court for the District of Columbia.[27] The court held the OED Director properly requested an extension of time to file an appeal of the

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[23] Case 00-07.

[24] For details, see Proceeding D2004-05, Spencer T. Nissen, Administrative Law Judge, March 9, 2006, page 23.

[25] Monzo v. Department of Transportation, 735 F2d 1335, (C.A.Fed. 1984); Pinat v. Office of Personnel Management, 931 F2d 1544 (C.A.Fed 1991).

[26] See Proceeding D2004-05, Spencer T. Nissen, Administrative Law Judge, March 9, 2006, page 23; see also Kersey v. Undersecretary of Commerce for Intellectual Property, et.al., 2005 WL 486144 (D.D.C. 2005).

[27] Id.

ALJ's Initial Decision and the appeal was properly and timely filed.[28] Respondent appealed this decision to the Court of Appeals for the Federal Circuit, and the decision of the lower court was upheld.[29]

Respondent also pursued this argument to the ALJ in this case. The ALJ held the appeal was properly and timely filed.[30] The ALJ further concluded that summary judgment was proper because Respondent had not presented evidence the appeal was untimely.[31]

The ALJ in this case, the District Court for the District of Columbia, and the Court of Appeals for the Federal Circuit, all concluded that the OED Director made a timely and proper appeal of the November 14, 2001, Initial Decision. Respondent has argued, but presented no evidence contrary to this conclusion. Absent any evidence, there can be no genuine dispute as to a material fact, and summary judgment was proper.

III. CONCLUSION

Each of Respondent's three grounds for reconsideration is without merit. First, the discrepancy between the Certificate of Service date and the mailing date had no effect on the merits or processing of this case. Second, it is not a conflict of interest for the General Counsel, acting under the authority delegated to him by the Director of the USPTO, to review the decision of one of his subordinates. Third, and finally, Respondent's contention that summary judgment was improper because there were disputed facts is not supported by any evidence. There was no

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[28] Id. at 6.

[29] Kersey v. Under Secretary of Commerce for Intellectual Property, No. 05-1272, Slip Copy, 2007 WL 1107740 (C.A.Fed. 2007).

[30] Proceeding D2004-05, Spencer T. Nissen, Administrative Law Judge, March 9, 2006, pages 23-29.

[31] Id. at 26.

genuine dispute as to any material fact, and summary judgment was proper. The Final Decision of August 3, 2006, was correct and should stand unchanged.

ORDER

Upon consideration of the Petition to the USPTO Director for reconsideration under 37 C.F.R. § 10.156(c), it is **ORDERED** that the Final Decision of August 3, 2006 is **AFFIRMED**.

On behalf of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office

JUN 27 2007
Date

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