UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE

In the Matter of:	)	
Gary Walpert,	)	**Proceeding No. D2018-07**
Appellant.	)	

Order

On February 9, 2021 Gary Walpert ("Appellant") filed an "Appellant's Request for Reconsideration and Modification of the Director's Final Order." ("Request for Reconsideration"). The Request followed the USPTO Director's Final Order on Appellant's hearing appeal. That Final Order, which was dated January 19, 2021 and filed on January 21, 2021, upheld a final decision of the Administrative Law Judge ("ALJ") that Appellant violated multiple provisions of the United States Patent and Trademark Office ("USPTO") disciplinary rules and excluded Appellant from practice before the USPTO in patent, trademark, and other non-patent matters. For the reasons set forth below, Appellant's Request for Reconsideration is denied.

I. PROCEDURAL BACKGROUND

The Director of the Office of Enrollment and Discipline ("OED Director") filed a Complaint and Notice of Proceedings under 35 U.S.C. § 32 ("Complaint") with the ALJ on December 15, 2017, charging Appellant with five Counts of violating the USPTO's disciplinary rules. The Complaint stemmed from allegations that he engaged in misconduct with regard to representation of a client, violated conflict of interest rules, and falsified emails to his law firm. Appellant timely filed his Answer to the disciplinary Complaint on February 1, 2018.

On March 2, 2018, the OED Director filed a Motion for Partial Summary Judgment. On May 9, 2018, the ALJ granted as to Count I of the Complaint. A hearing in this matter was held on October 16-17, 2018 and the ALJ issued the Initial Decision on June 14, 2019, finding that Appellant violated multiple disciplinary rules. After considering relevant aggravating and mitigating factors, the ALJ ordered that Appellant be excluded from the practice of patent, trademark, and other non-patent matters before the USPTO.

Appellant appealed the ALJ's Initial Decision. His appeal challenged the ALJ's credibility determinations, as well as disputed some of the factual findings made by the ALJ. He also claimed remorse for his misconduct. Appeal at 17, 26. However, in a Final Order dated January 19, 2021, the USPTO Director affirmed that ALJ's decision. Appellant's Request for Reconsideration followed on February 9, 2021.

II. LEGAL STANDARD

Following a final decision of the USPTO Director, either party may make a single request for reconsideration or modification of the decision by the USPTO Director if such request is filed within twenty days from the date of entry of the decision *See* 37 C.F.R. § 11.56(c). The provisions governing reconsideration state:

> No request for reconsideration or modification shall be granted unless the request is based on newly discovered evidence or error of law or fact, and the requestor must demonstrate that any newly discovered evidence could not have been discovered any earlier by due diligence.

Id. The standard of review governing requests under § 11.56(c) are not defined beyond what appears in the text of the regulation. However, although the Federal Rules of Civil Procedure are not applicable in administrative proceedings,[1] courts have at times looked to them for useful

[1] *See Bender v. Dudas*, No. 04-1301, 2006 WL 89831, at *23 (D.D.C. Jan. 13, 2006), *aff'd*, 490 F.3d 1361 (Fed. Cir. 2007).

guidance in judging actions taken by the USPTO.[2] The standard of review used by federal courts for motions to alter or amend a judgment under Rules 59(e) and 60 of the Federal Rules of Civil Procedure are most similar to requests for reconsideration filed pursuant to § 11.56(c). Because of that, the standard set forth in those rules has been previously utilized by USPTO in analyzing reconsideration requests. *See In re Faro*, Proceeding No. D2015-27 (USPTO Feb. 9, 2018); *In re Piccone*, Proceeding No. D2015-06 (USPTO Feb. 9, 2018); *In re Bang-er Shia*, Proceeding No. D2014-31 (USPTO Aug. 1, 2016). Accordingly, that standard is applied here to Appellant's Request for Reconsideration.

Federal courts have viewed the standard of review for Rules 59(c) and 60 as narrow and limited to only circumstances involving new evidence, or to correct errors of law or fact. *See Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Any new evidence submitted must not have been available before the issuance of the final decision. *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) ("Evidence that is available to a party prior to entry of judgment, therefore, is not a basis for granting a motion for reconsideration as a matter of law.") (citing *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)). Furthermore, it is long-settled that requests for reconsideration are not a vehicle to state a party's disagreement with a final judgment. *See Hutchinson*, 994 F.2d at 1082 ("mere disagreement does not support a Rule 59(e) motion"); *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007), *cert. denied*, 552 U.S. 1040 (2007) (stating that a Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment). A request for reconsideration should not be used to rehash "arguments previously presented" or to submit evidence that should have been previously submitted. *Wadley v. Park at Landmark, LP,*

[2] *See Gerritsen v. Shirai*, 979 F.2d 1524, 1532 (Fed. Cir. 1992).

No. 1:06cv777, 2007 WL 1071960, at *2 (E.D. Va. Mar. 30, 2007) (citing *Hutchinson*, 994 F.2d at 1081-82); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (holding improper a motion for reconsideration "to ask the Court to rethink what the Court had already thought through—rightly or wrongly"); *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977) (stating that Rule 59(e) is not intended to give "an unhappy litigant one additional chance to sway the judge"). Instead, reconsideration is appropriate where, for example, "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Above the Belt, Inc.*, 99 F.R.D. at 101; *United States v. Ali*, No. 13-3398, 2014 WL 5790996, at *3 (D. Md. Nov. 5, 2014).

While requests for reconsideration are permitted they are seldom granted. These types of motions are extraordinary remedies reserved only for extraordinary circumstances. *See Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (limiting relief under Rule 60(b)(6) to "extraordinary circumstances"); *Projects Mgmt. Co. v. DynCorp Int'l, LLC*, 17 F. Supp. 3d 539, 541 (E.D. Va. 2014), *aff'd*, 584 F. App'x 121 (4th Cir. 2014) (reconsideration of a judgment after its entry is an "extraordinary remedy which should be used sparingly" (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998))); *see also Netscape Commc'ns Corp. v. ValueClick, Inc.*, 704 F. Supp. 2d 544, 546 (E.D. Va. 2010). Consequently, the standard for granting a Request for Reconsideration under § 11.56(c) is very high and such requests are granted sparingly and only in extraordinary circumstances. For the reasons discussed below, Appellant has not made any arguments or submitted any evidence that satisfies the standard of review and his Request for Reconsideration is denied.

III. DECISION

Appellant does not base his request on newly discovered evidence, which eliminates one possible ground for granting reconsideration. Instead, he solely argues that USPTO Director's Final Order contained errors of law and fact. However, a review of his pleadings reveals that the perceived errors amount to little more than an attempt to relitigate facts and establish a narrative that has already been rejected, both by the ALJ and the Director. Because of that, and as further explained in this Order, Appellant does not satisfy the standards for granting reconsideration and his Request for Reconsiderations is denied.

A. Appellant Has Not Identified Any Errors in Law or Fact That Would Warrant Reversal of the Final Order.

Simple assertions of error are insufficient to grant reconsideration. Requests for reconsideration are not vehicles to assert a party's disagreement with a final judgment, to rehash arguments previously presented, or to submit evidence that should have been previously submitted. *See In re Bang-er Shia*, Proceeding No. D2014-31 (USPTO Aug. 1, 2016); *see also Hutchinson*, 994 F.2d at 1082 ("mere disagreement does not support a Rule 59(e) motion"); *Wadley*, 2007 WL 1071960, at *2 (citing *Hutchinson,* 994 F.2d at 1081-82); *Above the Belt, Inc.*, 99 F.R.D. at 101; *Durkin*, 444 F. Supp. at 889; *Ali*, 2014 WL 5790996, at *3 (Reconsideration, as an extraordinary remedy, "would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." (internal quotation marks omitted)). Thus, as previously noted, the standard of review for a Request for Reconsideration under § 11.56(c) is very high and such requests should be granted sparingly and only in extraordinary circumstances. *See Dowell*, 993 F.2d at 48; *Projects Mgmt. Co.*, 17 F. Supp. 3d at 541.

Although Appellant identifies a number of facts that he asserts were erroneously affirmed by the USPTO Director, a close review of Appellant's arguments reveals that those asserted errors are little more than disagreements with USPTO Director's Final Order and that Appellant does not establish any error of apprehension by the USPTO Director. Indeed, every single identified point of disagreement raised by Appellant in his Request for Reconsideration has been previously raised, and rejected, by both the ALJ and the USPTO Director. Because reconsideration does not serve as a vehicle to relitigate facts and arguments previously raised, Appellant's Request for Reconsideration here must be denied.

1. Credibility.

The bulk of Appellant's Request for reconsideration challenges, as he did on appeal, the credibility findings made by the ALJ, which were affirmed by the USPTO Director. Repeatedly, throughout his pleadings in support of reconsideration, Appellant challenges that his testimony and evidence should not have been discredited. Request for Reconsideration, at 3-4, 5-6, 7, 13-14; Reply at 4-5. But, as stated in the USPTO Director's Final Order in response to Appellant's credibility arguments there, "[w]hen findings are based on determinations regarding the credibility of witnesses, [the rule] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Final Order at 32 (second alteration in original) (internal quotation marks omitted). Further, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574-75 (1985)).

In this matter, the ALJ found by clear and convincing evidence that Appellant was not a credible witness and the Initial Decision contained a lengthy, thorough explanation for that finding. (A.12-14). In contrast, the ALJ concluded Mr. Kikoski (another founder of EAH) was a credible witness. (A.14). The issue of how witnesses were credited was the underpinning of Appellant's entire appeal, and he vociferously challenged those findings on appeal. Appeal at 4-15, 17-22. Despite that, the USPTO Director, in a lengthy analysis of the ALJ's credibility determinations, concluded there was no basis for overturning the ALJ. Final Order at 31-34. The USPTO Director found the ALJ's analysis was "supported by fact and, being present to witness all of the testimony, deference is to be accorded those findings." Final Order at 34. A significant foundation for the USPTO Director's affirmance was Appellant's own admissions that he falsified email to his employer, which was found to demonstrate a "proclivity for untruthfulness." *Id.* Appellant's arguments on the issue of credibility here amount to nothing more than another attempt to relitigate this issue. Thus, to the extent that the bulk of his argument in support of reconsideration rest upon the continued challenge to the credibility determinations made by the ALJ, as affirmed by the USPTO Director, those arguments do no provide a basis for granting Appellant's Request for Reconsideration.

2. <u>Other Errors.</u>

As to the remainder of Appellant's arguments that the USPTO Director's findings were erroneous, Appellant has previously, and unsuccessfully, raised these arguments as noted below:

1) Appellant argues that the USPTO Director's Final Order demonstrated an over-reliance on the fabricated emails since the content of the emails was accurate and his client was not improperly treated or hurt because of his actions. Request for Reconsideration at 4-5. He claims these facts were ignored and, as a result, that over-reliance is error. However,

Appellant previously raised these arguments to the Director on appeal. Appeal at 17, 25-26. The arguments were not ignored as Appellant alleges in the Request for Reconsideration. His arguments were rejected by the USPTO Director. Final Order at 23-24. Under the standards applicable to Requests for Reconsideration, he may not relitigate this issue here.

2) Appellant also claims remorse for fabricating the emails to his employer, that he should not have his misconduct "continuously used again and again" against him, and "the content of the emails was accurate and the client was not improperly treated or hurt because of [his] actions." Request for Reconsideration at 4, 7, 13. But, again, Appellant has already cited his remorse on appeal. Appeal at 17, 26. In his appeal, he raises exactly the same argument he now raises in his Request for Reconsideration. There, he stated:

> Respondent is deeply remorseful with regard to generating the fake emails he sent to Pierce Atwood. Respondent has recognized and continues to recognize that it was wrong, and unbecoming an attorney. Respondent is sincerely apologetic that he wrote those emails and deceived his firm. And while the act of creating the emails was wrong, Respondent must emphasize with the Director that while creating the emails was a wrongful act, the content of the emails was factually true. Respondent hopes that the Director will take this into account in his decision.

Appeal at 16. Because Appellant has already raised and litigated these arguments, it is outside the standards for reconsideration to allow him to relitigate those issues again here.

3) Related to the previous argument, above, Appellant also argues that his clients were not harmed as a result of his actions. Request for Reconsideration at 4, 11-13; Reply at 4-6. He raises the same arguments made to the ALJ and in his appeal to the Director. Appeal

at 4-5 ("The ALJ erred in finding that [EVH][3] was harmed by [Appellant's] actions"), 9-11. In short, Appellant's argument can be boiled down to the fact that Appellant asserts and believes that he "did no cause the client any harm." Reply at 4. But as already stated, reconsideration is not a vehicle for relitigating claims already raised and his arguments as to the harm caused by his misconduct amounts to nothing more than that. Further, the credibility of Appellant and Mr. Kikoski provided much of the foundation for rejecting Appellant's argument on the issue of harm, both before the ALJ and upon appeal. As noted in Section III.A.1 above, there is no basis to alter those credibility determinations on a request for reconsideration.

4) Appellant challenges the findings that he was an EVH Cofounder and/or had a business relation with EVH. Request for Reconsideration at 9-10; Reply at 6-7. Again, however, there was ample testimony on this point at the hearing and the ALJ found such relationships existed. He also unsuccessfully challenged these findings on appeal and his lack of success was, in part, based on his own admissions. Appeal at 15-17; Final Order at 30 ("Appellant admitted to both BBO and OED that he did own such an interest.") (citing A.911, A.916). Here, he reiterates those very same arguments that were made on appeal and rejected. Because Appellant has already raised and litigated these arguments, those arguments do not provide a foundation for granting reconsideration.

5) Appellant makes various arguments with regard to EVH's patent portfolio, when he filed applications on EVH's behalf, and whether it was Appellant's strategy to file a series of provisional patent applications. Request for Reconsideration at 10-12. Again, Appellant

[3] Appellant uses the acronym "EVH" in his Request for Reconsideration to refer to the client EnvAirHealth, while the Final Order utilized the reference "EAH." Both "EVH" and "EAH" refer to Appellant's former client, EnvAirHealth.

offered testimony and evidence on these points in the hearing, as well as on appeal. Appeal at 11-15. Despite having raised these arguments on appeal, the conclusions reached by the ALJ were affirmed by the USPTO Director. Final Order at 19-21, 25-27. The USPTO Director's affirmance on these issues were supported both by the record, as well as the determination of witness credibility. All of these factors have been challenged on the same bases as here on reconsideration and Appellant cannot relitigate those issues here.

6) Finally, Appellant challenges paragraph 18 of the Final Order, which concerns the finding that Mr. Kikoski augmented the truth when he states that Appellant told him that Appellant had some disagreement with senior management and that Appellant was leaving the firm over an unrelated issue. Request for Reconsideration at 11. Again, however, this was raised before the ALJ and the USPTO Director and rejected. Final Order at 8-9. Appellant's arguments here are the same ones already raised and rejected, rendering reconsideration inappropriate on this basis. Further, the foundation for the USPTO Director's findings here are based on the ALJ's credibility determinations that were upheld by the Director. As stated in Section III.A.1, there is no basis to allow Appellant to again challenge those determination or to grant reconsideration on this ground.

In summary, simple assertions of error are insufficient to grant reconsideration. Appellant here is not arguing that the USPTO Director "patently misunderstood" him, "made a decision outside the adversarial issues presented," or "made an error not of reasoning but of apprehension." *See Above the Belt, Inc.*, 99 F.R.D. at 101; *Ali*, 2014 WL 5790996, at *3; *Dowell*, 993 F.2d at 48; *Projects Mgmt. Co.*, 17 F. Supp. 3d at 541. Rather, he simply is arguing that he

disagrees with the USPTO Director's findings and is utilizing the Request for Reconsideration to make a last attempt to have these issues revisited and his discipline averted. But requests for reconsideration are not vehicles to assert a party's disagreement with a final judgment, to rehash arguments previously presented, or to submit evidence that should have been previously submitted. Consequently, Appellant's Request for Reconsideration here is denied.

3. Testimony of Andrew Roberts.

Appellant also challenges as erroneously permitted, the testimony of Andrew Roberts. Request for Reconsideration at 12. Specifically, he claims "the testimony of Andrew Roberts identified under Section 2 of the Final Order should have been stricken" since the documents upon which his testimony was based had not been provided to him. *Id.* Appellant's argument here does not provide a basis for granting reconsideration.

As an initial matter, because this is the first time Appellant has raised this argument, it is concluded that this argument is waived. Appellant admits in his Request for Reconsideration that he did not raise this objection at the disciplinary hearing. *Id.* He likewise did not raise it during the appeal to the USPTO Director. The first time he has raised this issue was in his Request for Reconsideration. Arguments not raised or developed during the appeal are waived on reconsideration. *See Smithkline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006).

An alternative basis for rejecting this argument is that it is simply without any foundation. The OED Director notes, and the record reflects, that the OED Director provided Appellant with discovery that included 98 documents from the OED Director's investigative file prior to the hearing. OED Response to Reconsideration at 20 (citing A.80-96). Appellant cites no specific document that he claims he should have received but did not. To the contrary, Appellant admits

he did not request those documents in discovery. Request for Reconsideration at 12. As a result, there is no basis on which to find that Mr. Roberts' testimony was erroneously permitted.

4. Errors of Law.

Finally, insofar as Appellant attempts to challenge or identify erroneous "points of law," that argument is also waived as it was not raised meaningfully, if at all, prior to his Request for Reconsideration. First, Appellant acknowledged in his Appeal that he did "not dispute any specific points of Law relied upon by the ALJ." Appeal at 3. Additionally, his challenge to erroneous points of law in his reconsideration pleadings can generously be described as fleeting. In his single paragraph mention of the issue, Appellant does not cite to or discuss a specific cases. Request for Reconsideration at 6-7. He pays even less attention to the issue in his Reply. Reply at 9. It is well-established that arguments that are not appropriately developed in a party's briefing may be deemed waived. *See United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) (citing *SmithKline Beecham Corp.*, 439 F.3d at 1320). Because Appellant did not raise the issue prior to his Request for Reconsideration, and paid the issue little more than a passing reference in his pleadings in support of Reconsideration, his arguments that there were erroneous points of law in the USPTO Director's Final Order is waived.

B. Appellant's Sanction Was Appropriate.

Appellant lastly asks that the sanction of exclusion be reconsidered. Request for Reconsideration at 13. The OED Director argues that Appellant waived his arguments with regard to sanction. OED Response to Reconsideration at 20-21. For the reasons set forth herein, it is concluded that Appellant waived his arguments challenging his sanction of exclusion.

Arguments that are not raised in initial briefings and/or are not appropriately developed in a party's briefing may be deemed waived. *See United States v. Great Am. Ins. Co. of New York*, 738

F.3d at 1328; *SmithKline*, 439 F.3d at 1319. Raising an argument requires more than mere statements of disagreement in order to not be considered waived. *SmithKline*, 439 F.3d at 1320 ("mere statements of disagreement . . . as to the existence of factual disputes do not amount to a developed argument."); *Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) ("When a party includes no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks omitted); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue . . . will not suffice to bring that issue before this court.' ") (omission in original) (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs.").

Here, Appellant made little more than singular statements of disagreement with the sanction imposed by the ALJ and affirmed by the USPTO Director. Appeal at 27-28; Request for Reconsideration at 7, 13. He makes no specific references to specific case law and offers no legal analysis to support his request. Request for Reconsideration at 6-7. Rather, he simply makes declarative statements of disagreement and references to the same arguments raised, and rejected, throughout these disciplinary processes. Although, for the first time in his Reply, he challenges the application of *Moatz v. Kersey*, Proceeding No. 00-07 (USPTO Oct. 24, 2002), that argument

is waived on the bases of both failure to raise the issue earlier and failure to sufficiently develop the argument. Further, his substantive challenge to *Moatz* is without merit. Appellant is correct that *Moatz* allows that there are sufficient instances where there is a "justification" for a grant of reconsideration. But, while such a justification was found in *Moatz*, as detailed in this Final Order, there is no such justification here.

IV. CONCLUSION

Having considered Appellant's Request for Reconsideration of Director's Final Order dated January 19, 2021 and filed on January 21, 2021, as well as the other pleadings, it is **ORDERED** Appellant's Request is **DENIED**.

APPEAL RIGHTS

Appellant is entitled to seek judicial review on the record in the U.S. District Court for the Eastern District of Virginia under 35 U.S.C. § 32 "within thirty (30) days after the date of the order recording the Director's action." *See* E.D.Va. Local Civil Rule 83.5.

IT IS SO ORDERED.

Users, Berdan, David
Digitally signed by Users, Berdan, David
Date: 2021.04.29 11:34:43 -04'00'

David Berdan — Date
General Counsel
United States Patent and Trademark Office

on delegated authority by
Andrew Hirshfeld
Performing the Functions and Duties of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office