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

HARRY I. MOATZ,	)	
	)	
Director, Office of Enrollment and Discipline,	)	
	)	
v.	)	Proceeding No. D02-14
	)	
GEORGE A. BODE,	)	
	)	
Respondent.	)	

FINAL DECISION UNDER 37 C.F.R. § 10.156

The Hon. Susan Biro ("ALJ") issued an Initial Decision ("ID") finding that Respondent backdated three certificates of mailing; failed to communicate with clients, resulting in eight patent and trademark applications going abandoned; and failed to respond to Requirements for Information (RFIs) issued by the Office of Enrollment and Discipline (OED). Specifically, the ID found that by backdating certificates of mailing Respondent violated the following rules: USPTO Disciplinary Rule ("Rule") 10.23(b), by engaging in conduct involving misrepresentation; Rule 10.23(b)(6), by engaging in conduct that adversely reflects upon his fitness to practice; and Rule 10.23(c)(9), by knowingly misusing certificates of mailing. The ID found that through various failings involving his representation of several clients, Respondent violated the following rules: Rule 10.23(c)(8), by failing to inform clients of correspondence; Rule 10.77(c), by neglecting legal matters entrusted to him; and Rule 10.84(a)(2), by failing to carry out contracts for employment. Finally, the ID found that by failing to respond to RFIs, Respondent violated the following rules: Rule 10.23(b)(5), by engaging in conduct prejudicial to the administration of justice, Rule 10.23(b)(6), by engaging in conduct

adversely affecting his fitness to practice, and Rule 10.23(c)(16), by willfully refusing to reveal or report knowledge or evidence to OED. The ID recommended that Respondent be suspended from practice before the United States Patent and Trademark Office ("USPTO") for seven years, with the final four years of the suspension to be stayed.

Respondent appealed the ID's findings. The OED Director responded to the appeal and cross-appealed, arguing that Respondent's conduct required his exclusion from practice before the USPTO. Respondent failed to respond to the OED Director's cross appeal.

For the reasons discussed herein, all findings set forth in the ID are adopted, as is the recommended penalty.

Direct Appeal

Respondent's appeal contains three substantive paragraphs. The first objects to the ID's findings of facts and conclusions of law because "the [ALJ] ignored the testimony of the Respondent and the obvious contradictory and biased testimony of the witnesses against Respondent." The second paragraph objects to the recommended sanction on precisely the same grounds. The third paragraph asserts the ALJ unfairly favored the Government and ignored the bias of its witnesses because the ALJ "ignored the testimony that the Director has long been investigating and harassing the Respondent and seeking to impair the Respondent's ability to practice before the Office."

The hearing in this matter elicited conflicting testimony concerning a number of facts material to the resolution of the charges against Respondent. The well-reasoned ID resolved these conflicts through explicit analysis of various indicia of reliability, including the demeanor of testifying witnesses. In many instances, the ALJ found

Respondent's testimony less credible than that of the witnesses against him. The ALJ's credibility determinations, based upon-first hand observation of the witnesses' demeanor, and supported by careful analysis of the surrounding circumstances, are entitled to deference. Haebe v. Dep't of Justice, 288 F.3d. 1288, 1300(Fed.Cir. 2002); Bradley v. Secretary of Health and Human Svcs., 991 F.2d 1570, 1575 (Fed. Cir. 1993). Respondent's brief, entirely devoid of any specific allegation of error, provides no basis to question them.

Similarly, Respondent does not refer to specific testimony that would establish that the OED Director's investigation was unduly prolonged or harassing, and no such testimony is apparent in the record. The OED Director, of course, did investigate Respondent, and, as Complainant in this matter, did seek to exclude him from practice before the Office. These facts, however, establish that the OED Director did his job, not that there is any error in the ID.

Cross Appeal

The ALJ indicated that if she had been writing on a clean slate she would have been "inclined to find the appropriate sanction in this case to be exclusion." However, after considering two previous Commissioner's Decisions addressing conduct similar to that involved here, the ID recommended a seven-year suspension with the final four years stayed. Specifically, the ID examined In re Klein, 6 USPQ 2d 1547 (1988), in which a practitioner found to have backdated certificates of mailing, neglected client matters, and provided misleading answers to OED RFIs was suspended for seven years, of which five were stayed, and Small v. Wiffenbach, 10 USPQ 2d 1898 (1989), in which a practitioner found to have engaged in similar conduct was suspended for five years.

The OED Director's Cross Appeal does not challenge the ID's conformance of the recommended penalty to those previously imposed by the USPTO in similar cases, but argues that the ID's comparison of the instant facts to those of the previous decisions was flawed. The ID noted that the Small decision had explained imposition of a longer effective suspension than that imposed in Klein because the practitioner in Small had involved his secretary in his backdating of mailing certificates and blamed her for them, had not been candid with the USPTO when asked about the backdating, had neglected entrusted legal matters, and had not shown contrition or remorse. The ID found that the Respondent here had not affirmatively made incorrect statements to OED about the backdating and had not attempted to place blame for it on anyone else. It therefore concluded that Respondent's conduct was not as serious as the conduct in Small, and imposed a shorter initially effective suspension.

The OED Director argues that the ID erred in finding that Respondent's conduct was less serious than that in Small. The OED Director asserts that, even though Respondent did not make false responses to the RFIs, the ID should have weighted his failure to respond more heavily in assessing the penalty. The ID was not unreasonable in treating Respondent's failure to respond to the RFIs as being less serious than making deliberate misstatements to OED.

The OED Director also alleges that Respondent lied to an OED investigator when he told the investigator that he would fax his response the RFIs and then did not do so. The ID actually found that, in a telephone conversation with the investigator, Respondent said that he did not have the response in front of him, but would ask his secretary to forward him a copy, which he would then forward to OED. ID at 19. The ID found that

OED never received the response. It is entirely possible that Respondent told the investigator that he would forward the response when he in fact had no intention of doing so. It is also possible, however, that, at the time he made the statement, Respondent intended to fax his response to OED, but that for some reason he ultimately failed to do so. The ID did not treat this episode as involving a misrepresentation to OED, and the record does not provide grounds to disturb this treatment.

The OED Director also asserts there is a strong likelihood that Respondent backdated filings in this case. While the ID refers to apparent discrepancies involving the dates on the certificates of service for several documents Respondent filed in this case, the ID does not conclude that the documents were in fact backdated. Further, the issue was not charged or litigated, and the record has not been developed as to the circumstances surrounding the filings. This is unlike the situation in Small, where misrepresentation to OED was charged and proven, and where a portion of the penalty was imposed directly on the basis of that violation. The ID did not err in distinguishing Small on this basis.

Finally, the OED Director argues that the ID found that Respondent misappropriated client funds and should have imposed more stringent discipline on the basis of this finding. The ID found that Respondent collected and held funds from one client to cover a $605 USPTO issue fee; did not remit the fee to the USPTO, thus permitting the application to go abandoned; and failed to return the fee to the client. The ID noted, however, that it did not treat the misappropriation as a separate charge and that the ALJ did not see it as a deliberate usurpation of client funds. ID at 38, note 51.

Instead, the ID treated it as "part and parcel of Respondent's general neglect of client maters." Id.

If Respondent had been charged with misappropriation of client funds and these charges had been sustained, a more severe penalty might well have been warranted. Given the posture of the case, however, the ID appropriately treated Respondent's failure to return the issue fee as part of his pattern of neglect. Viewed in this light, the apparent misappropriation does not fundamentally change the nature of the neglect. The ID expressly declined to find that Respondent had intentionally converted the funds. The amount at issue, although significant, is only of a fraction of the damage caused by Respondent's neglect.[1] Thus, Respondent's failure to return the issue fee does not itself warrant a more severe penalty under the neglect charges.

ORDER

Upon consideration of the entire record, and pursuant to 37 C.F.R. § 10.130(a), it is

ORDERED that thirty (30) days from the date this order is entered, George A. Bode, whose USPTO Registration Number is 30,028, shall be suspended from practice before the USPTO for seven years, with the final four years of the suspension stayed, and that Respondent Bode be placed on probation for the those four years. The terms of the probation are:

(i) Respondent shall comply with all Disciplinary Rules applicable to patent attorneys practicing before the USPTO; and

[1] The ID found that the value of the abandoned patents and trademarks, had they been issued, was irrelevant. However, the $605 issue fee is only a fraction of the total legal and USPTO fees paid but rendered futile as a result of Respondent's neglect.

(ii) No document in any patent or trademark application can be filed in the United States Patent and Trademark Office by or on behalf of Respondent which (a) uses a certificate of mailing under 37 C.F.R. § 1.8 and (b) indicates that the document was prepared by, worked on, or signed by or on behalf of, Respondent.

The Respondent's attention is directed to 37 C.F.R. § 10.158 regarding responsibilities in the case of suspension or exclusion, and 37 C.F.R. § 10.160 concerning petitions for reinstatement.

It is further ORDERED that this Final Decision in this proceeding be published.

RECONSIDERATION AND APPEAL RIGHTS

Any request for reconsideration of this decision must be filed within twenty (20) days from the date of entry of this decision. 37 C.F.R. § 10.156(c). Any request for reconsideration mailed to the PTO must be addressed to:

James A. Toupin
General Counsel
United States Patent and Trademark Office
PO Box 1450
Alexandria, Virginia 22313-1450

A copy of the request must also be served on the attorney for the Director of Enrollment and Discipline:

Sydney Johnson
Associate Solicitor
U.S. Patent and Trademark Office
Post Office Box 16116
Arlington, Virginia 22215

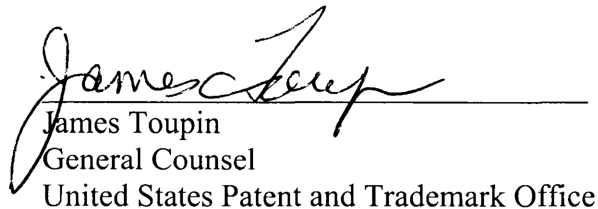
Any request hand-delivered to the USPTO must be hand-delivered to the Office of the General Counsel, in which case the service copy for the attorney for the Director shall be hand-delivered to the Office of Enrollment and Discipline.

If a request for reconsideration is not filed, and Respondent desires further review, Respondent is notified that he is entitled to seek judicial review on the record in the U.S. District Court for the District of Columbia under 35 U.S.C. § 32 and LCvR 83.7of the U.S. District Court for the District of Columbia within thirty (30) days of the date of entry of this decision.

IT IS SO ORDERED.

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

July 28, 2004
Date



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