

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE**

In the Matter of:

STACY QUINN JOHNSON,

Respondent.

Proceeding No. D2014-12

February 11, 2015

**ORDER DENYING OED DIRECTOR'S MOTION TO RECONSIDER
INITIAL DECISION AND CLARIFYING TERMS OF PROBATION**

By *Initial Decision and Order* ("Initial Decision"), dated December 31, 2014, the Court found that Stacy Quinn Johnson ("Respondent") violated the disciplinary rules of the United States Patent and Trademark Office ("USPTO"). Specifically, the Court concluded that Respondent engaged in conduct that is prejudicial to the administration of justice, and that Respondent's misconduct and subsequent suspension from the State Bar of Georgia constitute violations under 37 C.F.R. §§ 10.23(a) and (b) via 10.23(c)(5), and 10.23(b)(5) of the USPTO Code of Professional Responsibility; and 37 C.F.R. § 11.804(a) via 11.801(b), and 11.804(d) of the USPTO Rules of Professional Conduct.¹ After considering the factors set forth in 37 C.F.R. § 11.54(b), the Court found a one-year suspension, with all but ninety (90) days of the suspension stayed, to be warranted. The Court also ordered Respondent to be placed on probation for the remainder of a year.

On January 28, 2015, the Director of the Office of Enrollment and Discipline ("OED Director") of the USPTO moved for reconsideration of the *Initial Decision*. In the *Motion to Reconsider Initial Decision* ("Motion"), the OED Director seeks reconsideration of the sanction imposed by the Court but does not challenge the Court's factual findings or decision regarding the USPTO disciplinary rules violations. The OED Director claims the Court "overlooked several aggravating factors," which the OED Director believes support the imposition of a three (3) year suspension of Respondent.

Legal Standard

The hearing procedures governing disciplinary proceedings before the USPTO are silent as to the legal standard the Court should apply in considering a motion to reconsider an initial decision. However the regulations authorize the USPTO Director to grant a request for reconsideration or modification of the Director's final order if the request is based on newly discovered evidence or error of law or fact. 37 C.F.R. § 11.56(c). This standard is also generally applied in federal courts. See Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007), cert. denied

¹ The USPTO Rules of Professional Conduct apply to persons who practice before the Office and became effective May 3, 2013. Respondent committed various violations of the USPTO disciplinary rules both before and after the effective date of the USPTO Rules of Professional Conduct. Therefore, the Court applied the USPTO Code of Professional Responsibility for violations occurring prior to May 3, 2013.

552 U.S. 1040 (2007); Harrington v. City of Chicago, 433 F.3d 542, 546 (7th Cir. 2006). Accordingly, the Court adopts and applies this standard in reviewing the OED Director's *Motion*. See 37 C.F.R. § 11.39(c)(8) (authorizing the Court to adopt procedures and modify procedures for the orderly disposition of proceedings).

Discussion

In moving for reconsideration, the OED Director does not claim the Court committed an error of law or fact, nor does he present newly discovered evidence to support his position that the factors referenced above warrant a more severe sanction. Rather, the OED Director claims the Court, "failed to give sufficient weight to multiple aggravating factors." As such, the OED Director asserts that Respondent should be suspended for a minimum of three years and that probation is not appropriate in this case.

I. Reconsideration of the aggravating factors is not warranted.

The OED Director claims the Court's sanction of a one-year suspension, with all but 90-days stayed, is too lenient. In support of its argument, the OED Director cited the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") and identified four aggravating factors he claims are present in this case. They are (1) Respondent exhibited a pattern of misconduct by repeatedly ignoring requests for information made by the State Bar of Georgia and the OED; (2) Respondent's "bad faith obstruction" of the disciplinary proceeding to include a failure to appear for the hearing; (3) Respondent's false statement submitted to the OED during the disciplinary process; and (4) Respondent's refusal to acknowledge the wrongful nature of his conduct.

Those four factors cited by the OED Director as aggravating were previously identified in the *OED Director's Post Hearing Brief*, dated October 15, 2014. In determining an appropriate sanction, the Court considered the entire record of this proceeding, including the OED Director's position on the existence of those factors as aggravating. When applying the ABA Standards, the Court concluded that only two aggravating factors exist, which are the pattern of misconduct exhibited by Respondent and the false statement Respondent made to the OED during the proceeding. As to the two remaining factors, the Court did not find them to be supportive of a harsher sanction for the following reasons.

First, in this case the Court did not find Respondent's failure to appear at the hearing to warrant a more severe sanction. USPTO regulation provides that if Respondent fails to appear at the hearing after a notice of hearing has been given by the Court, the Court may deem Respondent to have waived the right to a hearing and may proceed with the hearing in his absence. 37 C.F.R. § 11.44(b). Here, Respondent's absence did not cause a delay or otherwise disrupt the hearing proceedings. Respondent did not disregard any subpoena or order of the Court requiring his attendance.² As a result of his failure to appear, Respondent simply waived his right to a hearing, which was more prejudicial to Respondent than to the OED Director. A hearing was conducted nonetheless, affording counsel for the OED Director the opportunity to be

² The Respondent has a due process right to appear at the hearing. However, Respondent had no duty to travel to the District of Columbia, or to attend the hearing. Similarly, Respondent had a due process right to respond to the within motion, but was under no duty to do so and, in fact, did not do so.

heard, uncontested.³ Accordingly, the Court did not find Respondent's failure to appear to be an aggravating factor in this case.

Second, the OED Director proffered no evidence that Respondent "refused to acknowledge the wrongful nature of his misconduct . . . has taken no responsibility for his misconduct, or even agreed that he did engage in misconduct." In his *Answer*, Respondent admitted that he received a suspension from the State Bar of Georgia; that the suspension was subsequently lifted; and he maintained that he adequately responded to the State Bar of Georgia's Notice of Investigation. At the hearing, counsel for the OED Director admitted that Respondent was reinstated and in good standing with the State Bar of Georgia. An exhibit submitted by the OED Director explains that Respondent's reinstatement in the State Bar of Georgia was due to the fact that he had sufficiently cooperated with the State Bar of Georgia's investigation, which was still ongoing. Accordingly, the Court found that this factor was not aggravating.⁴

II. A three-year suspension is not supported by the record.

The OED Director claims Respondent should be suspended for a minimum of three years. In support of this position, the OED Director notes that Respondent was suspended in Georgia for 383 days due to his failure to cooperate with the Georgia disciplinary investigation. The OED Director also cites a Final Order issued by the USPTO Director wherein a six-month suspension was imposed against another respondent who failed to cooperate with the OED investigation.

The OED Director's argument that the sanction should, at a minimum, mirror the Georgia suspension plus six months for failing to cooperate with OED is not persuasive. At the hearing, counsel for the OED Director offered the following information:

Court: But he's currently not suspended [in Georgia]?

Counsel: Currently not suspended. He's currently admitted in Georgia, because it's just merely a suspension to force a lawyer to cooperate with the investigation. Once they start cooperating, then they get readmitted.

The period of Respondent's suspension from the State Bar of Georgia does not reflect the severity of Respondent's misconduct, but rather the amount of time it took Respondent to comply. The Court is not inclined to impose greater sanctions based simply on the passage of time rather than specific factors set forth by USPTO regulation. See 37 C.F.R. § 11.54(b).⁵

³ Respondent was, of course, provided a copy of the hearing transcript, and notified of his opportunity to submit a post-hearing brief. His waiver of the right to submit a post-hearing brief was likewise not an aggravating factor.

⁴ Indeed, whatever the State Bar of Georgia is investigating is for resolution by the State Bar of Georgia. If Respondent is sanctioned by the State Bar of Georgia, the USPTO Director may, in his discretion, impose reciprocal sanction. 37 C.F.R. § 11.24.

⁵ This matter was brought as an attorney disciplinary proceeding following the procedural rules found in 37 C.F.R. §§ 11.32-11.57—not as a reciprocal discipline case that would follow the procedures of 37 C.F.R. § 11.24.

The Court is also not persuaded by the OED Director's argument that a six-month suspension is warranted for the count of failing to cooperate with OED. The decision cited by the OED Director in support of his position is a Final Order memorializing a settlement between the OED Director and another respondent. See In re Donrad, D2014-33 (USPTO Sept. 9, 2014). The sanction imposed was determined based upon an agreement between the parties and the Final Order contains no analysis of the factors set forth in 37 C.F.R. § 11.54(b). The USPTO hearing procedures require the Court to consider such factors. Imposing a sanction without doing so would violate USPTO regulation. Accordingly, the OED Director has not demonstrated that reconsideration is warranted or that a three-year suspension should be imposed.

III. Probation is appropriate.

The OED Director also claims that a sanction more significant than probation is warranted because "Respondent intentionally failed to cooperate with Georgia's legal disciplinary process as well as OED's investigation. Moreover, he disregarded the disciplinary complaint filed against him and willfully failed to appear at his disciplinary hearing."

The sanction in this case is a one-year suspension. The Court, in imposing this sanction, considered the factors in 37 C.F.R. § 11.54(b) and the ABA Standards. The Court also recognized that Respondent's misconduct arose from his disregard for responding to inquiries of the State Bar of Georgia and the OED, and not due to any substantive misconduct. As such, the Court determined that all but the initial ninety (90) days of the suspension would be stayed and Respondent should be placed on a probationary period for the remainder of a year. This sanction will encourage Respondent's cooperation with the State Bar of Georgia—and the OED—and will sufficiently protect the public from future misconduct. Accordingly, imposing a probationary period following Respondent's initial suspension is appropriate.

Conclusion

The *Motion* does not claim that the Court committed an error of law or fact, nor is it supported by new evidence. Rather, counsel for the OED Director recapitulate arguments previously raised and considered by the Court. For the foregoing reasons, the *OED Director's Motion to Reconsider Initial Decision* will be **DENIED**.⁶

Clarification of Probation

The OED Director has requested clarification of the language in the *Initial Decision*. As such, the Court clarifies that Respondent's sanction shall be as follows:

- (a) Respondent shall be suspended from practice before the USPTO in patent, trademark, and other non-patent matters for ninety (90) days commencing on the date the *Initial Decision* becomes final;

⁶ Reasonable minds can disagree on the sanctions appropriate in a given case. The decision as to an appropriate sanction may be changed on appeal by the USPTO Director. That is a permissible and legitimate part of this process.

- (b) Respondent shall remain suspended from practice of patent, trademark, and non-patent law before the USPTO until the OED Director grants a petition requesting Respondent's reinstatement;
- (c) Respondent shall serve a two hundred seventy-five (275) day period of probation beginning on the date the OED Director grants a petition pursuant to 37 C.F.R. § 11.60 reinstating Respondent ("Respondent's probationary period");⁷
- (d) If the OED Director is of the opinion that Respondent, during Respondent's probationary period, has failed to comply with any provision of the *Initial Decision* or any Disciplinary Rule of the USPTO Rules of Professional Conduct, the OED Director may :
 - (1) Issue to Respondent an Order to Show Cause as to why the USPTO Director should not enter an order immediately suspending Respondent for up to an additional two hundred seventy-five (275) days for the violations set forth in the *Initial Decision*;
 - (2) Send the Order to Show Cause to Respondent at the last address of record Respondent furnished to the OED Director pursuant to 37 C.F.R. § 11.11(a); and
 - (3) Grant Respondent fifteen (15) days to respond to the Order to Show Cause; and

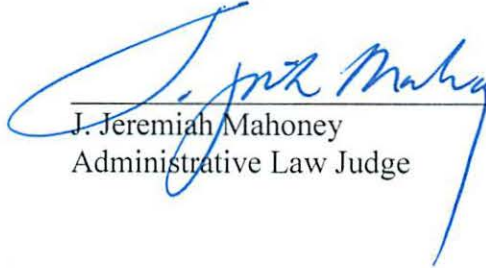
If after the 15-day period for response the OED Director determines that Respondent, during Respondent's probationary period, failed to comply with any provision of the *Initial Decision* or any Disciplinary Rule of the USPTO Rules of Professional Conduct, the OED Director may:

- (i) Deliver to the USPTO Director: (1) the Order to Show Cause, (2) Respondent's response to the Order to Show Cause, if any, and (3) evidence and argument causing the OED Director to be of the opinion that Respondent, during Respondent's probationary period, failed to comply with any provision of the *Initial Decision* or any Disciplinary Rule of the USPTO Rules of Professional Conduct, and
- (ii) Request that the USPTO Director enter an order immediately suspending Respondent for up to an additional two hundred seventy-five (275) days for the violations set forth in the *Initial Decision*;

⁷ The Court has been asked, in essence, to specify a procedure for the probationary period and its revocation, if called for. These procedures might best be left to the agency that must oversee the probation, and specified in the agency's regulations.

- (e) In the event that the USPTO Director enters an order pursuant to the *Initial Decision* suspending Respondent during his probationary period, and Respondent seeks review of the USPTO Director's action, any such review shall not operate to postpone or otherwise hold in abeyance the USPTO Director's suspension order.

So **ORDERED**.



J. Jeremiah Mahoney
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER DENYING OED DIRECTOR'S MOTION TO RECONSIDER INITIAL DECISION AND CLARIFYING TERMS OF PROBATION**, issued by J. Jeremiah Mahoney, Administrative Law Judge, in D2014-12, were sent to the following parties on this February 11, 2015, in the manner indicated:


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