

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

In the Matter of)
)
 Joseph Stecewycz,)
)
 Appellant.)
_____)

Proceeding No. D2014-15

ORDER DENYING APPELLANT’S REQUEST FOR RECONSIDERATION

The United States Patent and Trademark Office (“USPTO,” “Agency,” or “Office”) instituted disciplinary proceedings against Joseph Stecewycz (“Appellant”) for violations of its disciplinary rules in connection with Appellant’s filing of patent documents before the Agency.

An administrative hearing was held before Administrative Law Judge (“ALJ”) J. Jeremiah Mahoney and, on April 27, 2015, ALJ Mahoney issued an initial decision concluding that the Appellant violated four ethics rules in connection with his misconduct of repeatedly submitting a debit card to the USPTO that was declined, allowing his client’s application to go abandoned, and not advising his client of either fact: 37 C.F.R. § 10.23(c)(3) (proscribing failing to properly or timely remit funds from a client to the Office); 37 C.F.R. § 10.23(b)(4) (proscribing engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 37 C.F.R. § 10.23(b)(5) (proscribing engaging in conduct that is prejudicial to the administration of justice); and 37 C.F.R. § 10.77(c) (proscribing neglect of a legal matter entrusted to the practitioner). As a sanction, the ALJ suspended Appellant from practicing before the USPTO for two years and ordered him to pay restitution to his former client.

Pursuant to 37 C.F.R. § 11.55, Appellant appealed the April 27, 2015 initial decision of the ALJ. After briefing by the parties, the Director of the USPTO issued a Final Order on May 5, 2016 concluding that the ALJ’s findings were fully supported by the record, that the factors

considered by him under 37 C.F.R. § 11.54(b) before imposing the sanction of suspension was appropriate, and ordering Appellant to pay restitution in the amount of \$1010.

On May 25, 2016, Appellant moved for reconsideration of the Final Order by filing the instant Request for Reconsideration (“Request”)¹, pursuant to 37. C.F.R. § 11.56(c). Although not explicit, Appellant’s Request is read as seeking reconsideration of the sanction imposed by the Director of the USPTO and challenging the Director’s factual findings and decision by asserting new evidence and that the Director of the USPTO made errors of law and fact in issuing the Final Order.

A response was filed by the OED Director on June 21, 2016. The Appellant did not submit a reply.

After reviewing Appellant’s arguments, and for the reasons set forth below, Appellant’s Request for Reconsideration is **DENIED**.²

I. Legal Standard

The regulations authorize the Director of the USPTO to grant a request for reconsideration or modification of the Director’s Final Order if the request is based on newly discovered evidence, or an error of law or fact. *See* 37 C.F.R. § 11.56(c). The standard of review governing requests under § 11.56(c) has not been defined beyond what appears in the

¹ On May 25, 2016, Respondent filed, via email, an “Appeal,” under 37 C.F.R. § 11.56(c) following the May 5, 2016 Final Order of the USPTO Director on Appellant’s hearing appeal. On June 13, 2016, an Order was issued stating that the Appellant’s request for an “Appeal” would be read as a Request for Reconsideration Pursuant to 37 C.F.R. § 11.56(c), permitting the OED Director to respond to Appellant’s Request and permitting Appellant to submit a Reply to the OED Director’s Response.

² 37 C.F.R. § 11.56(c) requires a Request for Reconsideration be filed within 20 days from the date of the decision. Although there is no regulation on what constitutes filing, the Final Order advised that any request for reconsideration must be mailed to the General Counsel. Final Order at 41. On May 25, 2016, Appellant filed his Request for Reconsideration via email. In his email, Appellant stated that he mailed a hardcopy to the General Counsel, however a copy was not received by the General Counsel via U.S. mail. Appellant’s failure to comply with the requirements for filing a Request for Reconsideration stated in the Final Order serve as an independent basis on which the Director is permitted to, and does, reject the instant Request.

regulations. Although the Federal Rules of Civil Procedure are not applicable in administrative proceedings,³ the courts have at times looked to them for useful guidance in judging actions taken by the USPTO.⁴ Because 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 pursuant to § 11.56(c), that standard is applied to the instant Request.

Federal courts have clarified that the standard of review for Rules 59(c) and 60 are narrow and limited to only certain 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 (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.”) (quoting *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)). Reconsideration “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.” *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983); *United States v. Ali*, No. 13-3398, 2014 WL 5790996, at *3 (D. Md. Nov. 5, 2014).

It is long-settled that requests for reconsideration⁵ are not a vehicle to state a party’s disagreement with a final judgment. *See Hutchinson*, 994 F.2d at 1082 (“mere disagreement does

³ *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), *cert denied* 553 U.S. 1017 (2008).

⁴ *See Gerritsen v. Shirai*, 979 F.2d 1524, 1532 (Fed. Cir. 1992).

⁵ Such request refer to either motions to alter or amend a judgment (Fed. R. Civ. P. 59(e)), or motions for relief from a judgment or order (Fed. R. Civ. P. 60).

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 which should have been previously submitted. *Wadley v. Park at Landmark, LP*, No. 1:06CV777, 2007 WL 1071960, at *2 (E.D.Va. 2007) (citing *Hutchinson*, 994 F.2d at 1081-82); *Above the Belt, Inc.*, 99 F.R.D. at 101 (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”).

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. 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).

Thus, 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. For the reasons discussed below, Appellant has not proffered any arguments or evidence that satisfies the standard of review, and therefore the Request is **DENIED**.

II. Discussion

In moving for reconsideration, the Appellant appears to claim the Director of the USPTO committed errors of law or fact, and requests that the Final Order be amended.⁶ *See* Request at 1-2. However, Appellant does not present any newly discovered evidence, or identify errors in law or fact that support his argument that the Final Order warrants amendment or dismissal.

A. Appellant Does Not Present Newly Discovered Evidence.

Appellant seeks to challenge the Director's findings regarding the sufficiency of funds held in his bank accounts. Specifically, Appellant alleges that he had sufficient funds in his bank account during the relevant time and that "it has since been determined by the Appellant that, in the relevant time frame of Mr. Turner's CIP filing, the Bank issued a new Debit Card at its own initiative, and the Appellant failed to update the new card information in the Credit Payment form used for payment of Mr. Turner's patent application." Request at 2. However, the case law is clear that only "new evidence" will be considered when evaluating the merits of a request to reconsider a judgement. *See Hutchinson*, 994 F.2d at 1081. Any evidence that was available, or could have been discoverable, before the Final Order was issued cannot be considered in evaluating the arguments in the Request. *See Boryan*, 884 F.2d at 771.

Upon review, the Appellant's allegation does not identify any new evidence that supports a dismissal or amendment of the Final Order. Appellant alleges it has "since" been determined that the Bank issued him a new Debit Card during at the time he made payments to the USPTO on behalf of his client. Request at 2. Appellant does not clarify whether he has only recently

⁶ The relief Appellant requests is unclear. Appellant only requests that the references to "credit card" be corrected to state instead that Appellant uses a "Debit Card." Appellant notes that the petition fee of \$945 appears to be incorrect, that the Order stating that Appellant shall not apply for, obtain or have his name added to a customer number violates 37 C.F.R. 1.31, and that the finding that Appellant's conduct involved deceit is not factual. Therefore, Appellant's Request is read as seeking that the Final Order be amended.

learned of this alleged error by the bank or why this information was not discoverable or available during his case-in-chief, nor does he present any correspondence or documents from his bank to support his statement. Furthermore, Appellant has been on notice of the investigation into his conduct and the dishonored payments to the USPTO since at least July 25, 2013, the date of the first Request for Information from the OED Director. A. 1031-1036. The hearing was conducted on December 2, 2014 (A. 1178-1221), and the ALJ issued his Initial Decision and Order on April 27, 2015. A. 1-9. Appellant had nearly two years to investigate his bank records and discover the evidence. Regulation governing motions for consideration specifically provides “the requestor must demonstrate that newly discovered evidence could not have been discovered any earlier by due diligence.” 37 C.F.R. § 11.56(c). Here, Appellant has failed not only to explain why he was unaware of the alleged actions of his bank but has also failed to provide evidence of due diligence or an explanation of why he could not have discovered the information he now presents any earlier. Additionally, Appellant has failed to provide any “evidence” aside from his unsupported allegations. For these reasons, Appellant’s arguments do not constitute new evidence that would require the dismissal or amendment of the Final Order.

B. Appellant Does Not Identify Any Errors of Fact or Law That Warrant Amendment or Dismissal of the Final Order.

In support of his Request, Appellant appears to argue several errors of fact and law. Appellant, however, cites no authority for his assertions and substantial evidence in the record supports the Director’s findings. Furthermore, Appellant has not pointed to any clear error of law that must be corrected. Thus, Appellant’s arguments do not constitute errors of fact or law requiring dismissal or amendment of the Final Order.

1. Calculation of Restitution

Appellant claims that the Director erred in calculating the restitution ordered. Request at 1. The Director found that Appellant's former client, Mr. Turner, had to pay a \$65 surcharge and a \$945 petition fee to revive his abandoned application due to Appellant's misconduct. *See* A. 212, A. 301, A. 906-906, A. 912. Thus, the Director ordered Appellant to pay \$1010 in restitution. Final Order at 40. Appellant argues that the revival fee for a Micro-Entity was reduced to \$425. Request at 1. First, Appellant submits no authority for his contention. Second, the unrebutted evidence presented at the hearing showed that on February 12, 2013, Mr. Turner filed a Petition for Revival of his patent application and paid an additional \$945 in filing fees to revive his application along with a \$65 surcharge. A. 212, A. 301, A. 906-906, A. 912. Appellant has offered nothing to change the calculation of the restitution owed, nor has he shown that the Director made an error in reaching a decision as to the amount of restitution owed.

2. Customer Number

Appellant also claims that it is improper to preclude him from obtaining a Customer Number. Request at 1-2. The Final Order orders Appellant to disassociate his name from any Customer Numbers and public key infrastructure ("PKI") certificates associated with those Customer Numbers and precludes Appellant from applying for, obtaining, or having his name added to a USPTO Customer Number, unless and until he is reinstated to practice before the USPTO. Final Order at 40. The Appellant claims that this will preclude him from filing and prosecuting applications on his own behalf, thus violating 37 C.F.R. § 1.31. However, even without a Customer Number, Appellant will still be able to file new *pro se* patent applications via the EFS-Web, the Agency's Patent Electronic Filing System without incurring the non-

electronic filing fee surcharge for utility applications under 37 C.F.R. § 1.16(t).⁷ Appellant will also still be able to prosecute his pending *pro se* applications and any future *pro se* applications by transmitting correspondence (such as responses to Office Actions) via facsimile transmission or non-electronically via paper submissions delivered by the U.S. Postal Service or a commercial courier service, such as Federal Express. 37 C.F.R. § 1.6 (c) & (d).

As a practical matter, Appellant's dissociation from any Customer Numbers means that he does not have the convenience associated with sending prosecution correspondence via the Agency's Private Patent Application Information Retrieval System ("PAIR") system. However, as discussed above, he will still be able to file and prosecute *pro se* applications, even without a Customer Number and access to Private PAIR. Thus, the Final Order precluding Appellant from having a USPTO Customer Number does not prevent or hinder Appellant from filing or prosecuting his own *pro se* applications.

3. Reference to "Credit Card"

Appellant also claims that the one use of "credit card" in the Final Order is incorrect and that Appellant used a Debit card in his transactions with the Patent Office. Request at 2. The Final Order found that "Appellant provided information related to credit card payments he had made to the USPTO ... but did not produce the requested bank records." Final Order at 7. First, Appellant, by his own admission, made reference to credit card payments to the Patent Office. A. 1045. Second, Appellant admitted that his debit card functioned as a credit card. A. 1046. Finally, the fact that the Final Order referred once to a credit card payment, is of no relevance to the findings that Appellant violated four ethics rules in connection with his misconduct of

⁷ See <http://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/nonprovisional-utility-patent#heading-3>. EFS-Web is a Web-based patent application and document submission system in which anyone with a Web-enabled computer can file patent applications without downloading special software or changing document preparation tools and processes. *Id.*

repeatedly submitting a debit card to the USPTO that was declined, allowing his client's application to go abandoned, and not advising his client of either fact. In order to succeed in a reconsideration, there must be a showing that "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. Appellant has not met this burden of proof, and therefore, the claims are rejected.

III. Conclusion

Appellant's Request does not support the assertion that the Director of the USPTO committed an error of law or fact, nor is it supported by new evidence. Rather, Appellant merely states his disagreement with the findings in the Final Order. For the reasons above, the Appellant's Request for Reconsideration is **DENIED**.

ORDER

Having considered Appellant's Request under 37 C.F.R. § 11.56(c), it is hereby ordered that the Request is **DENIED**.

If Appellant desires further review, Appellant is notified that he 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.

January 17, 2017
Date


Sarah Harris

General Counsel
United States Patent and Trademark Office

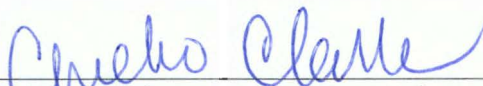
on behalf of
Michelle K. Lee
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

cc:
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CERTIFICATE OF SERVICE

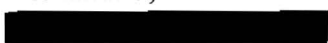
I hereby certify that copies of the foregoing ORDER was sent to the following parties on January 17, 2017, in the manner indicated:


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