File: D2020-0015 Date: JUN 25 2020

In re: David E. PIVER, Attorney

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

FINAL ORDER OF DISCIPLINE

ON BEHALF OF EOIR: Paul A. Rodrigues, Disciplinary Counsel

ON BEHALF OF DHS: Catherine M. O'Connell, Disciplinary Counsel

ON BEHALF OF RESPONDENT: David J. Chapman, Esquire

The respondent will be suspended from practice before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security ("DHS") for 30 days.

On December 12, 2019, in the United States District Court for the Eastern District of North Carolina, the respondent pled guilty to aiding and abetting false statements pursuant to 8 U.S.C. § 1306(c) and 18 U.S.C. § 2. On January 23, 2020, the Disciplinary Counsel for the Executive Office for Immigration Review ("EOIR") and the Disciplinary Counsel for the DHS filed a joint petition seeking the respondent's immediate suspension from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS.

The respondent filed a response in opposition to the petition, and the Disciplinary Counsels for EOIR and the DHS then filed a response to the respondent's opposition. On February 6, 2020, the respondent filed a reply to the Disciplinary Counsels' response.

While we were reviewing the Petition for Immediate Suspension and the parties' subsequent responses, the respondent filed an answer to the Notice of Intent to Discipline. In the answer, the respondent requested a hearing. *See* 8 C.F.R. § 1003.105(c)(3). The Disciplinary Counsels for EOIR and the DHS then filed a motion for summary adjudication. The Disciplinary Counsels argue that there are no issues of material fact in dispute in the respondent's case and that the only disputed issue is an issue of law, namely whether the respondent's offense qualifies as a serious crime as defined in 8 C.F.R. § 1003.102(h).

The respondent, however, opposes summary adjudication. The respondent argues that, even if the Board can resolve the serious crime issue, the Board should not resolve, in summary proceedings, the factual disputes that must be settled before an appropriate sanction can be determined. The respondent contends that the facts underlying his conviction are in dispute and that these facts together with the mitigating factors he has presented in his other filings must be considered by an adjudicating official. He further maintains that he has a right to due process in disciplinary proceedings and this right would be violated by summary proceedings.

We agree with the Disciplinary Counsels for EOIR and the DHS that the respondent has not made a prima facie showing that there is a material issue of fact in dispute regarding the basis for

summary disciplinary proceedings. *See* 8 C.F.R. §1003.106(a). The respondent does not dispute the fact that he was convicted, and his conviction provides the basis for summary disciplinary proceedings. *See* 8 C.F.R. § 1003.103(b)(1). The respondent does dispute the claim that his offense qualifies as a serious crime as defined in 8 C.F.R. § 1003.102(h), but this is a legal issue that we can and must resolve without additional fact-finding. We do not have the authority to look behind the record of conviction and readjudicate the respondent's guilt or innocence.[1] *See, e.g.*, 8 C.F.R. § 1003.102(h) (stating that a plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section); *cf. Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (the Board may not entertain collateral attacks or look behind a conviction to readjudicate the guilt or innocence of an alien). Further, we are authorized to determine an appropriate sanction in summary proceedings, and the respondent's arguments on this point do not make a prima facie showing that there is a material issue of fact relating to the basis for summary proceedings. We therefore deny the respondent's request for a hearing.

The Disciplinary Counsels for EOIR and the DHS allege that the respondent's conviction constitutes a "serious crime" as defined in 8 C.F.R. § 1003.102(h) and therefore subjects him to discipline. The respondent, however, maintains that his offense did not involve fraud or any other type of moral turpitude. Accordingly, the respondent asserts that his offense does not qualify as a "serious crime." The respondent also contends that the Disciplinary Counsels for EOIR and the DHS have misrepresented his offense by submitting a dismissed indictment rather than the criminal information and the transcript of his plea and sentencing hearing which more accurately reflect the basis for his conviction.

We agree with the respondent that the Disciplinary Counsels for EOIR and the DHS should not have submitted only the criminal indictment, which was dismissed, to provide information regarding the basis for the respondent's conviction (Respondent's Answer, Tab A at 5 and Tab D; Respondent's Response, Tab I at 5 and Tab J). The Disciplinary Counsels also should have included the criminal information and the transcript of the respondent's plea hearing, both of which demonstrate the basis for the respondent's plea (Respondent's Answer, Tabs A and B; Respondent's Response, Tabs E and I). The respondent, however, has provided these documents and we have considered them in these proceedings. The respondent therefore has had a full and fair opportunity to present his case.

Moreover, the Disciplinary Counsels for EOIR and the DHS are correct that the dispositive issue is whether the offense for which the respondent was convicted constitutes a "serious crime" as defined in 8 C.F.R. § 1003.102(h), not whether his offense qualifies as a crime involving moral turpitude. The regulations state that "[a] serious crime includes any felony and also includes any lesser crimes, a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file

[1] The regulations do authorize us to consider whether disciplinary proceedings lacked due process or were based on a clear "infirmity of proof", but the current proceedings are not based on a final order of discipline from another jurisdiction. *See* 8 C.F.R. § 1003.103(b)(2)

income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime." 8 C.F.R. § 1003.102(h). The parties do not dispute that the respondent was convicted of a misdemeanor. The key issue therefore, is whether false swearing, misrepresentation, fraud, deceit, or dishonesty was a necessary element of his offense.

The respondent pled guilty to a violation of 8 U.S.C. § 1306(c). This provision states: "[a]ny alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor." 8 U.S.C. § 1306(c).

The information from the respondent's criminal proceedings, which replaced the indictment, charges the respondent with aiding and abetting an alien to knowingly file an application for registration with false statements (Respondent's Answer, Tab B; Respondent's Response, Tab E). The plea agreement and the transcript from the respondent's plea and sentencing hearing further establish that the respondent pled guilty to this offense (Respondent's Response, Tabs G and I). The respondent therefore was convicted of an offense a necessary element of which involved dishonesty or misrepresentation. *See* 8 C.F.R. § 1003.102(h). Accordingly, the respondent is subject to discipline.[2]

The Disciplinary Counsels for EOIR and the DHS state that the respondent should be disbarred due to his conviction for a serious crime. The facts of this case, however, weigh against disbarment. First, the respondent was not convicted of violating the second clause of 8 U.S.C. § 1306(c) (Respondent's Answer, Tab B; Respondent's Response, Tabs E, G, and I). The respondent was convicted of making a false statement, not engaging in immigration fraud. The reference to immigration fraud in the Notice of Intent to Discipline therefore is inaccurate (Notice of Intent to Discipline at 2).

Second, the respondent's offense was a misdemeanor and the federal district judge hearing his case imposed only a fine as punishment (Respondent's Answer, Tab A at 18; Tab D). In imposing this sentence, the federal district judge gave the respondent a more lenient sentence than that to which the parties had agreed in the plea agreement (Respondent's Answer, Tab C). Accordingly, the federal judge did not believe the respondent's conduct warranted even a period of probation.

Third, the respondent complied with his obligation under 8 C.F.R. § 1003.103(c) and informed the Disciplinary Counsels for EOIR and the DHS of his conviction. Fourth, the respondent has no criminal history and no prior disciplinary violations. Further, as of the date of this order, the respondent has not been subject to public discipline in Pennsylvania and remains an active attorney

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[2] The respondent asserts that his offense is not a crime involving moral turpitude and therefore cannot be a serious crime. In making this argument, he relies upon comments made in the federal register upon the adoption of revised disciplinary regulations. *See* 65 FR 39513, 39515. The regulatory definition of "serious crime," however, does not include the requirement that an offense qualify as a "crime involving moral turpitude", and we are bound to follow the language of the regulations.

in that jurisdiction. Finally, the respondent has presented detailed arguments and has submitted evidence to suggest that he did not make a knowingly false statement with the intent to deceive immigration authorities. The respondent instead claims that he aided and abetted his client in making the statement to preserve legal defenses and to obtain the opportunity to present all of the facts and the defenses during an interview. The respondent further asserts that he had a professional duty as an attorney to preserve these defenses and that he could have been accused of ineffective assistance of counsel if he had not done so (Respondent's Response, Tabs B, C, D, Q, R, S, and T). We consider these arguments to be unsound and self-serving.

However, given all of these facts, and the fact that the original indictment filed in the respondent's criminal case was dismissed, disbarment is not warranted at this time. *See* 8 C.F.R. § 1003.101(a). We instead will suspend the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 30 days, effective upon the issuance of this order.

ORDER: The Board hereby suspends the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 30 days. The suspension commences immediately.

FURTHER ORDER: The respondent shall promptly notify, in writing, any clients with cases currently pending before the Board of Immigration Appeals, the Immigration Courts, or the DHS that the respondent has been suspended from practicing before these bodies.

FURTHER ORDER: The respondent shall maintain records to evidence compliance with this order, and the respondent must notify the Board of any further disciplinary action against him.

FURTHER ORDER: The contents of the order shall be made available to the public, including at the Immigration Courts and appropriate offices of the DHS.

FURTHER ORDER: The respondent may petition this Board for reinstatement to practice before the Board, the Immigration Courts, and the DHS under 8 C.F.R. § 1003.107.

FOR THE BOARD

Board Member Ellen Liebowitz respectfully dissents without separate opinion and would grant the respondent's request for a hearing.